Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1995

MARCIA N. FRASER,
Petitioner,
v.
LINTAS: CAMPBELL-EWALD
and
THE INTERPUBLIC GROUP OF COMPANIES, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND APPENDIX

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QUESTION PRESENTED

SHOULD THIS COURT GRANT CERTIORARI TO REVIEW A PUBLISHED DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, IN WHICH A PANEL OF THAT COURT IMPROPERLY RESTRICTED THE SCOPE OF SECTION 502(a)(1)(B) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED ("ERISA") BY DECLARING THAT THERE WAS NO REMEDY AVAILABLE TO A BENEFICIARY OF AN ERISA-QUALIFIED EMPLOYEE BENEFIT PLAN WHO SUFFERED SUBSTANTIAL TAX-RELATED LOSSES AS A RESULT OF A BREACH OF FIDUCIARY DUTY BY THE PLAN'S NAMED FIDUCIARIES?

LIST OF PARENT COMPANIES AND NONWHOLLY-OWNED SUBSIDIARIES

Respondents Lintas: Campbell-Ewald and The Interpublic Group of Companies, Inc., have no parent companies or nonwholly-owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Marcia N. Fraser respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit entered on June 9, 1995 in these proceedings.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported in *Fraser* v. *Lintas: Campbell-Ewald*, 56 F.3d 722 (6th Cir. 1995), and is reproduced at pages A-1 to A-9 of the Appendix.

The Order of the United States District Court for the Eastern District of Michigan, Southern Division (Hon. Bernard Friedman) granting Respondents' Motion to Dismiss with Prejudice is unreported, but is reproduced at pages A-10 to A-20 of the Appendix.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was issued June 9, 1995. Appendix at A-1 to A-9. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 404 and 502(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"); 29 U.S.C. § 1104 (1990) and 29 U.S.C. § 1132(a) (1993). ERISA Section 404 is reproduced at A-21. ERISA Section 502(a) is reproduced at A-21 to A-22. This case also involves Section 402(f)(1) of the Internal Revenue Code; 26 U.S.C. § 402(f)(1), which is reproduced at A-23, and Treas.Reg. § 1.402(f)-1 (1990), which is reproduced at A-23 to A-24. For simplicity, the statutes involved in this Petition are, respectively, designated as "*ERISA Section ___*" and as "*Section ___ of the Internal Revenue Code.*"

STATEMENT OF THE CASE

Petitioner Marcia N. Fraser ("Petitioner") respectfully requests that this Court review a published opinion of the United States Court of Appeals for the Sixth Circuit (Hon. Allan E. Norris, writing for the court), which affirmed an August 27, 1993 Judgment and Order of the United States District Court for the Eastern District of Michigan (Hon. Bernard A. Friedman) granting a motion to dismiss Petitioner's claims with prejudice. Petitioner complained under Section 502(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The substance of Petitioner's claim is that Respondents (Named Fiduciaries of an ERISA-qualified benefit plan of which Petitioner was a beneficiary) breached their fiduciary duty to provide Petitioner with all of her plan benefits by failing and/or refusing to

properly inform Petitioner of her tax-related rights under the plan. Petitioner suffered a significant loss of benefits under her plan, which is compensable in a personal civil action pursuant to ERISA Section 502 (a)(1)(B).

Background Facts

Petitioner obtained a divorce in 1989 from Frank Fraser, who was then an employee of Respondent Lintas: Campbell-Ewald, and a Participant in The Interpublic Savings Plan (the "Plan"). It is undisputed that, at all times herein relevant, the Plan was a qualified retirement plan subject to ERISA, and that Respondents were fiduciaries of the Plan. *Fraser* v. *Lintas: Campbell-Ewald*, 56 F.3d 722, 724 at n. 2 (6th Cir. 1995).

Pursuant to a Qualified Domestic Relations Order entered by the Oakland County Michigan Circuit Court October 12, 1989, and amended April 11, 1990, Petitioner was awarded $173,545.00 of the Plan assets held in the account of Frank Fraser, to be distributed in a lump sum (the "Account Balance").

The Account Balance was distributed to Petitioner on or about May 4, 1990. At the time the distribution was made, Respondents were required to notify Petitioner in writing, within two (2) weeks, of the options and elections available to her under ERISA and the Internal Revenue Code.[1] The purpose of the notice requirement was to enable Petitioner (and other similarly-situated participants and beneficiaries) to take advantage of the tax-related Plan benefits which are fundamental to ERISA, but which are unlikely to be known or understood by the average participant or beneficiary due to the complexity of applicable federal statutes and regulations. Among these tax related benefits was Petitioner's

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[1] **Section 402(f)(1) of the Internal Revenue Code, which is reproduced at A-23, and Treas.Reg. § 1.402(f)-1 (1990), which is reproduced at A-23 to A-24.**

right to "*roll over*" the Account Balance within 60 days of the distribution and, thereby, to avoid immediate taxation of the Account Balance to Petitioner.[2]

Instead of providing the required written notice, Respondent Interpublic advised Petitioner ***in writing*** (as an enclosure with the Account Balance) that "*a statement notifying you of tax liability on this distribution will be sent to you shortly.*" However, the promised statement explaining these tax-related benefits was never provided to Petitioner.

Petitioner did not have any outstanding debts or liabilities at the time she received the distribution of her Account Balance. Had Petitioner been properly advised of her option to do so by Respondents, Petitioner would have rolled-over the entire Account Balance into an IRA to defer the imposition of taxes. Moreover, Petitioner's low income tax bracket makes it likely that Petitioner would never have owed any significant income taxes on the Account Balance, if she had been properly advised of her roll-over rights under the Plan, and had been able to timely roll-over the Account Balance into an IRA.

Because she was not educated by Respondents, Petitioner failed to roll over her Account Balance, and incurred significant tax-related losses as a direct and proximate result of Respondents' failures.[3]

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2 See ERISA Section 2005(e)(1)(B); 26 U.S.C. § 402(e)(1)(B), and Internal Revenue Code Section 402(c)(1); 26 U.S.C. § 402(c)(1).

3 Petitioner incurred additional liability on her 1990 income tax return of $28,913.00 ($28,310.00 in additional income taxes and a $603.00 penalty for failure to file a quarterly estimated return on the Distribution). Petitioner also lost the income which would have been generted by the $28,913.00, and has lost the earnings growth potential which would have been available to her in an IRA through the compounding of tax-deferred earnings.

Course Of Proceedings And Disposition Below

Petitioner filed her Complaint on May 4, 1993 in the District Court for the Eastern District of Michigan, Southern Division. Petitioner's Complaint was assigned to the Honorable Bernard A. Friedman.

Petitioner's Complaint alleges that Respondents breached their ERISA fiduciary duties to Petitioner, a beneficiary under the Plan.[4] Specifically, Respondent Interpublic breached its fiduciary duties as the Plan Administrator by failing to advise Petitioner of her tax-related benefits under the Plan, and that Respondent Lintas violated its fiduciary duties as the Plan Sponsor by retaining and failing to adequately supervise Respondent Interpublic. Respondents' fiduciary breaches caused Petitioner to suffer a loss of Plan "*benefits*," which are compensable in a personal civil action pursuant to ERISA Section 502(a)(1)(B).[5]

On June 9, 1993, Defendants filed their Motion to Dismiss with Prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Petitioner timely filed her Brief in Opposition to Defendants' Motion to Dismiss With Prejudice, and presented oral arguments at the August 26, 1993 hearing. The district court granted Respondents' Motion to Dismiss on August 26, 1993. The

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4 Petitioner alleges that Respondents' duty to provide Petitioner with all of the information necessary to enable her to take advantage of her tax-related benefits was implicit in Respondents' fiduciary duty to act in Petitioner's "*best interests*" pursuant to ERISA Section 404. Petitioner argued that Respondents' duty was even more obvious because Respondents were obligated under Section 402(f)(1) of the Internal Revenue Code to provide Petitioner with written notice of her rollover rights. Petitioner did not attempt to create a private right to enforce any provision of the Internal Revenue Code. Rather, petitioner used that statute only to illustrate the nature of Respondents' fiduciary duties. See, *also*, discussion, *infra*, at note 6.

5 ERISA Section 502(a)(1)(B) is reproduced at A-21 to A-22, and provides that "*A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due him under the terms of his plan . . .*"

district court did not issue a written opinion, but ruled from the bench (with little elaboration) that Petitioner's claims could not be viable "*without an extension of existing law*" (the oral argument transcript is reproduced at A-10 to A-20). Pursuant to its ruling, on August 27, 1993, the District Court entered Judgment (A-25), and its Order Granting Defendants' Motion to Dismiss (A-26).

Petitioner timely filed her Notice of Appeal on September 21, 1993. Petitioner extensively briefed her position, and appeared before a panel of the Sixth Circuit Court of Appeals (Circuit Judges Boyce F. Martin, David A. Nelson and Allan E. Norris) on October 7, 1994 to present oral arguments. Petitioner argued on appeal that Respondents breached their fiduciary duties to Petitioner under ERISA Section 404 by failing to act in Petitioner's "*best interests*,"[6] and that Petitioner's lost tax advantages were compensable ERISA "*benefits*" pursuant to *Warren* v. *Society National Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 498 U.S. 1080; 111 S.Ct. 2256; 114 L.Ed.2d 709 (1991) (*the tax advantages of plan participation are* "***the most significant benefits available under ERISA***"), and various opinions of this Court and other circuit courts of appeal.

On June 9, 1995, the Sixth Circuit issued its Opinion, affirming the district court's dismissal of Petitioner's Complaint (the Sixth Circuit's Opinion is published in *Fraser* v. *Lintas: Campbell-Ewald*, 56 F.3d 722 (6th Cir. 1995), and is reproduced at A-1 to A-9).

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6 **As discussed, Respondents' failure and/or refusal to provide Petitioner with the legally-required explanation of her tax-related rights evidences that Respondents did not act "*solely in the best interest*" of Petitioner, a plan beneficiary, in violation of ERISA Section 404. See, *e.g.*, *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570; 105 S.Ct. 2833, 2840; 86 L.Ed.2d 447 (1985) (*laws enacted to protect plan beneficiaries are incorporated by implication into ERISA Section 404, 29 U.S.C. §1104*) and *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 142; 105 S.Ct. 3085, 3090; 87 L.Ed.2d 96 (1985) (*the disclosure of specified information is a "principal statutory duty" of ERISA fiduciaries*).**

In its Opinion, the Sixth Circuit seized upon Petitioner's admitted receipt of her Account Balance, and held (contrary to its prior published opinion in *Warren*, *supra*) that no remedy is available under ERISA Section 502(a)(1)(B), because the tax advantages lost by Petitioner as a result of Respondents' fiduciary breaches were not "*benefits due*" to Petitioner under the Plan. Therefore, the Sixth Circuit concluded, Petitioner was seeking "*equitable relief*," and should have sued under ERISA Section 502(a)(3),[7] which does not authorize awards of money damages. *Mertens* v. *Hewitt Associates*, 508 U.S. ___, ___; 113 S.Ct. 2063, 2069-2070; 124 L.Ed.2d 161 (1993).

As is more fully discussed herein, the Sixth Circuit's Opinion improperly places substantial restrictions upon the rights of participants and beneficiaries under ERISA-qualified employee benefit plans. In essence, the Sixth Circuit has rewritten ERISA Section 502(a)(1)(B) in a way that conflicts with ERISA's legislative purposes, and with applicable decisions of this Court and other federal courts. Petitioner respectfully prays that this Court issue a writ of certiorari to review the Sixth Circuit's Opinion, so that the Sixth Circuit's erroneous pronouncements may be reversed by this Court in accordance with sound principles of statutory interpretation.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully prays that the Court exercise its discretion by issuing a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit which was issued in this case.

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7 ERISA Section 502(a)(3) is reproduced at A-22, and provides that a civil action may be brought "*to enjoin any act or practice which violates this title or the terms of the plan*" or to obtain "*other appropriate equitable relief.*"

There are special and important reasons for this Court to issue a writ of certiorari in this case. The Sixth Circuit's Opinion significantly and inappropriately restricts the rights of ERISA plan participants and beneficiaries, by effectively rewriting ERISA Section 502(a)(1)(B) in derogation of ERISA's legislative purposes, and in a manner that conflicts with applicable decisions of this Court. Moreover, this Petition presents important questions of federal law which have not been, but should be, settled by this Court.

I.

THE SIXTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The Sixth Circuit's new and unreasonably narrow definition of the term "*benefit*" under ERISA conflicts with prior decisions of this Court by effectively adding language to ERISA Section 502(a)(1)(B) which improperly divests plan participants and beneficiaries of important rights and remedies that existed prior to the enactment of ERISA.

A. The Sixth Circuit's Opinion Improperly Revises ERISA Section 502(a)(1)(B) By Adding Restrictions That Congress Is Deemed To Have Expressly Rejected.

The Sixth Circuit's Opinion violates this Court's directives by effectively rewriting ERISA Section 502(a)(1)(B) in a manner that conflicts with ERISA's legislative purposes.

"*The authority of courts to develop 'federal common law' under ERISA is not the authority to revise the text of the statute.*" *Mertens* v. *Hewitt Associates*, 508 U.S. ___, ___; 113 S.Ct. 2063, 2070; 124 L.Ed.2d 161 (1993). The Sixth

Circuit has violated the *Mertens* Court's directives, effectively rewriting ERISA Section 502(a)(1)(B) in its Opinion. By equating the term "*benefit*" with the defined term "*account balance*," the Sixth Circuit has rendered meaningless Congress' choice of terms in ERISA Section 502(a)(1)(B).[8] This Court abhors any interpretation which renders statutory language to be superfluous. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. ___, ___; 112 S.Ct. 2589, 2596; 120 L.Ed.2d 379 (1992); *Lorillard* v. *Pons*, 434 U.S. 575, 583; 98 S.Ct. 866, 871; 55 L.Ed.2d 40 (1978). This Court should not tolerate such a result in this case.

ERISA plan "*benefits*" are comprised of much more than just the Account Balance held by a beneficiary in a qualified plan. Black's Law Dictionary defines "*benefit*" as "*something to* [the] *advantage of, or profit to*" the recipient, which the recipient "*was not previously entitled to receive . . . 'Benefits' of contract are advantages which result to either party from performance by the other.*" BLACK'S LAW DICTIONARY 158 (6th ed., 1990). The Sixth Circuit noted in its Opinion that the Plan's Documents and Instruments stress that tax savings are an important advantage to be gained by participants and beneficiaries. *Fraser*, *supra* at 725. ERISA is also replete with indications that Congress intended that tax advantages be included in the definition of "*plan benefits*." Indeed, the rollover exemption provided by ERISA Section 2005(e)(1)(B) is just one of many indications that tax advantages are at the heart of Congress' scheme for encouraging participation in ERISA-qualified pension plans.

Moreover, if Congress had actually intended for ERISA Section 502(a)(1)(B) to carry the limitations created by the Sixth Circuit, the statute could easily have been drafted to provide that beneficiaries may only recover

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8 "*Accrued benefits*" and "*account balance*" are both terms that Congress specifically defined by ERISA Section 3(23)(B). However, the term "*benefit*" is not defined by any ERISA section.

"*accrued benefits due*" or that beneficiaries may only recover "*account balances due.*" ERISA is a "*complex and reticulated statute*," which resulted from almost a decade of congressional study. See, *e.g.*, *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361; 100 S.Ct. 1723, 1726; 64 L.Ed.2d 354 (1980). The absence in ERISA Section 502(a)(1)(B) of the Sixth Circuit's limitation is compelling evidence that such a limitation was expressly rejected by Congress. *Mertens*, *supra*.

Indeed, the Sixth Circuit recognized in a prior ***published*** opinion that Congress did ***not*** intend to exclude the tax advantages of plan participation from its definition of ERISA "*benefits*." In *Warren* v. *Society National Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 498 U.S. 1080; 111 S.Ct. 2256; 114 L.Ed.2d 709 (1991), a fiduciary of an ERISA qualified plan failed to perform a required act, with the result that (as here) a plan participant's distribution could not be rolled over into an IRA, causing the participant to incur significant tax-related losses. The defendant in *Warren* argued that the plaintiff suffered no loss because he received his entire account balance. The plaintiff admitted receipt of his account balance, but argued that the defendant's breach of fiduciary duty caused him to suffer increased tax and tax interest, and loss of potential investment earnings on his account balance. The Sixth Circuit agreed with the plaintiff, and held that loss of tax-related benefits is "*the loss of* ***one of the most significant benefits available under ERISA***" (emphasis supplied). *Warren*, *supra* at 982.[9]

Other federal courts have agreed with the *Warren* court's reasoning, and recognized that tax advantages are "*benefits*" due under ERISA plans. In *Corcoran* v.

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9 The Sixth Circuit mistakenly held that *Warren* was "*effectively*" overruled by *Mertens*, *supra*. *Fraser*, *supra* at 725. However, as is discussed, *infra*, the *Mertens* case has absolutely no effect upon the viability of this aspect of the *Warren* opinion. *Mertens* only establishes that money damages may not be awarded in suits brought *pursuant to ERISA Section 502(a)(3).*

United Healthcare, Inc., 965 F.2d 1321, 1337 (5th Cir. 1992), the Fifth Circuit adopted the *Warren* court's holding, and found that ERISA "*allows for recovery of beneficiaries' increased tax liability.*" Similarly, in *Novak* v. *Anderson Corporation*, 962 F.2d 757, 759 and 761 (8th Cir. 1992), *cert. denied*, ___ U.S. ___; 113 S.Ct. 2928; 124 L.Ed.2d 678 (1993) the Eighth Circuit recognized that the failure by a plan fiduciary to provide a required roll-over notice constitutes a breach of fiduciary duty under ERISA, and that recovery of lost tax advantages may be an appropriate remedy.[10] Finally, in *Kendal Corp.* v. *Inter-County Hospitalization Plan*, 771 F.Supp. 681, 685 (E.D. Pa. 1991) the district court stressed that one of the important goals of ERISA is "*to make certain that participants and beneficiaries not be deprived of* ***the full value of their plan benefits***" (Emphasis supplied).[11]

A careful review of the pertinent statutory language and legislative history of ERISA will demonstrate to this Court that Respondents' fiduciary breaches severely diminished the *value* of Petitioner's Account Balance and, thereby, caused Petitioner to suffer a compensable loss of plan "*benefits.*" This Court must reverse the Sixth Circuit's Opinion because ERISA's carefully-

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10 The *Novak* court held that money damages were not available because the plaintiff sued under ERISA Section 502(a)(3). *Novak*, *supra* at 761. See, *also*, *Mertens*, *supra* at ___; 113 S.Ct. at 2069-2070. The *Novak* court explained that a recovery of damages related to the plaintiff's lost tax advantages may have been appropriate under a different ERISA section, but noted that the plaintiff had admitted (perhaps erroneously) that he had received all of the "*benefits due*" to him under his plan. Therefore, there was a "*consequential difference*" between Novak's situation and that presented in *Warren*, even though the *Warren* and *Novak* plaintiffs suffered identical losses and sought relief under the same remedial section of ERISA. *Novak*, *supra* at 759 and 761. See, *also*, *Warren*, *supra* at 982.

11 See, *also*, *Hoefel* v. *Atlas Tack Corp.*, 561 F.2d 1, 7 (1st Cir. 1978), *cert. denied*, 440 U.S. 913; 99 S.Ct. 1227; 59 L.Ed.2d 462 (1979) (a pre-ERISA case), in which the First Circuit declared that the cost of replacement investment opportunities with competitive rates of return is a "*fair and reasonable measure of damages*" for a loss of pension benefits.

integrated enforcement provisions should be held to provide an avenue of redress for Petitioner's substantial losses.

B. The Sixth Circuit's Opinion Improperly Affords ERISA Participants And Beneficiaries Substantially Less Protection Than They Enjoyed Before ERISA Was Enacted.

The Sixth Circuit's Opinion violates this Court's directives by narrowly construing ERISA Section 502(a)(1)(B) to afford ERISA plan participants and beneficiaries significantly *less* protection that they enjoyed before the enactment of ERISA.

ERISA was enacted "*to promote the interests of employees and their beneficiaries in employee benefit plans*," *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85, 90; 103 S.Ct. 2890, 2896; 77 L.Ed.2d 490 (1983), and should be liberally construed to provide a broad range of remedies to aggrieved plan participants and beneficiaries. See, *e.g.*, *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111; 109 S.Ct. 948; 103 L.Ed.2d 80 (1989), *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 56; 107 S.Ct. 1549, 1558; 95 L.Ed.2d 39 (1987), and *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 579; 105 S.Ct. 2833, 2840; 86 L.Ed.2d 447 (1985). In *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 142; 105 S.Ct. 3085, 3090; 87 L.Ed.2d 96 (1985), Justice Brennan explained that ERISA's legislative history "*demonstrates beyond question that Congress intended to engraft trust-law principles onto the enforcement scheme*," and to provide aggrieved plan beneficiaries and participants "*such remedies as are necessary for the protection of their interests*" (footnotes and citations omitted). *Russell*, *supra* at 152-158.

In *Firestone Tire & Rubber Co.* v. *Bruch*, *supra*, this Court declared that it would reject any interpretation of ERISA that "*would afford less protection to employees and their beneficiaries then they would have enjoyed before ERISA*

was enacted." *Id.* at 114; 109 S.Ct. at 959. In this case, the "*make-whole*" relief sought by Petitioner is necessary for the protection of plan participants and beneficiaries, and is consistent with what was available to them prior to the enactment of ERISA. Therefore, such relief may not now be repudiated by the Sixth Circuit.

Before the enactment of ERISA, actions seeking damages for an employer's denial of benefits were governed by contract law principles. *Firestone*, *supra* at 112. Contract damages are intended "*to place the aggrieved party in the same economic position he would have had if the contract had been performed*." J. Calamari & J. Perillo, *The Law of Contracts* § 14-4, at 591 (3d ed. 1987); see, *also*, *Restatement (Second) of Contracts* § 347 (1981); 5A. Corbin, *Corbin on Contracts*, § 992, at 5-7 (1964); 11 S. Williston & Jaeger, *Williston on Contracts* § 1338, at 197-203 (3d ed. 1968). Under the classic formulation of contract damages, an aggrieved party may recover the damages directly stemming from a breach of the contract if the damages were foreseeable. *Hadley* v. *Baxendale*, 156 Eng. Rep. 145, 151 (1854). See, *also*, J. Calimari & J. Perillo, *supra*, § 14-5, at 594; *Restatement (Second) Contracts*, *supra*, § 351. To be recoverable, the extent of the losses must also be reasonably certain. J. Calimari & J. Perillo, *supra*, § 14-8, at 599-600.

In this case, the Sixth Circuit explicitly recognized that Petitioner's damages were both foreseeable and reasonably certain:

> As the summary plan description provided by [Respondent] Interpublic makes clear, ***tax savings are an incentive to participate in the plan***. Moreover, the summary description highlights the advantages to be gained from use of the "*rollover*" provision.

(emphasis supplied). *Fraser*, *supra* at 725. Accordingly, the tax benefits of Petitioner's lost rollover rights "*may*

reasonably be supposed to have been in the contemplation of both parties" and the loss of those tax advantages was a "*probable consequence of the breach.*" *Hadley* v. *Baxendale*, *supra* at 151. The loss of the tax advantages was also reasonably certain, in that Petitioner's immediate tax loss on the Distribution could be precisely calculated and total loss could readily be projected.

Clearly, Petitioner's damages would have been properly awarded under contract principles. Pursuant to this Court's holdings in *Firestone*, *supra*, that type of relief must be made available under ERISA as well.

II.

THIS PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents the Court with a unique opportunity to provide a much-needed clarification of fiduciary liability under ERISA, even if the facts of this case do not convince the Court that there has been a compensable loss of plan "*benefits*" under ERISA Section 502(a)(1)(B).

The Sixth Circuit's decision is compelling evidence of the confusion presently emanating from the federal appellate courts since this Court's decisions in *Massachusetts Mutual Life Ins. Co.* v. *Russell*, *supra* and in *Mertens* v. *Hewitt Associates*, *supra*. In each of those cases, plan participants raised claims for breach of fiduciary duty, and this Court found that suit was improperly brought ***under the wrong remedial section of ERISA***. However, this Court specifically declined, on both occasions, to rule upon the underlying issue of the scope of the rights of participants and beneficiaries to bring suit for violations of ERISA's strict fiduciary requirements. Given ERISA's almost legendary com-

plexity, it has proven to be easily misinterpreted by the federal courts. The Sixth Circuit's Opinion in this case demonstrates that this Court must furnish the lower courts with greater guidance than has been provided by *Russell* and in *Mertens*.

In *Massachusetts Mutual Life Ins. Co.* v. *Russell*, *supra*, the participant complained under ERISA Section 502(a)(2), which authorizes a plan participant or beneficiary to bring a civil action against a plan fiduciary who has violated the duties enumerated in ERISA Section 409.[12] This Court held that ***ERISA Section 502(a)(2)*** **does not provide for individual actions because ERISA Section 409 provides only for recovery to the plan, itself,**[13] but specifically declined any extension of its holding to prohibit awards of money damages in personal actions under the other subparts of ERISA Section 502(a).[14] Indeed, Justice Brennan (in a concurring opinion) went so far as to suggest that such relief might properly be granted pursuant to ERISA Section 502(a)(3):

> This case presents a single, narrow question: whether the § 409 "*appropriate relief*" referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of extra-contractual damages for breach of fiduciary duty . . . I agree with the Court's decision today that § 409 is more fairly read in context as providing *'remedies that would protect the entire plan'* rather than

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12 The plaintiff in *Russell* sought compensation for emotional injuries and punitive damages after an interruption of plan benefits allegedly caused the plaintiff's disabled husband to cash out his retirement savings which, in turn, aggravated a psychological condition that caused him to suffer a back ailment.

13 *Russell, supra* at 148.

14 The *Russell* court specifically noted that, "*because respondent relies entirely upon § 409 . . . we have no occasion to consider whether any other provision of ERISA authorizes recovery.*" *Russell, supra* at 139.

> individuals, and that ***participants and beneficiaries accordingly must look elsewhere in ERISA for personal relief***. Indeed, since § 502(a)(3) already provides participants and beneficiaries with *'other appropriate relief . . . to redress [ERISA] violations,'* there is no reason to construe § 409 expansively in order to bring these individuals under the penumbra of *'equitable or remedial relief'*

(Emphasis supplied). *Russell*, *supra* at 149-150.

Following the suggestion of Justice Brennan, numerous federal courts made money damage awards "*in equity*" under ERISA Section 502(a)(3). See, *e.g.*, *Anweiler* v. *American Electric Power Service Corp.*, 3 F.3d 986 (7th Cir. 1993), and *Bixler* v. *Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3rd Cir. 1993). This Court put an end to such extensions of ERISA Section 502(a)(3) in *Mertens* v. *Hewitt Associates*, *supra*.

The plaintiff in *Mertens* brought an action under ERISA Section 502(a)(3) for damages that resulted when a plan actuary's negligence caused the plan to become unfunded. In affirming dismissal of the plaintiffs' claims, this Court held that ***ERISA Section 502(a)(3)*** **does not permit an award of monetary damages**:

> Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages* — monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief. And [the phrase] *'other appropriate equitable relief'* [precludes] awards for compensatory or punitive damages

(citations omitted). *Mertens*, *supra* at ___; 113 S.Ct. at 2068.

The *Mertens* Court did ***not*** find that damage awards are prohibited under ERISA in all instances. Nevertheless, the Sixth Circuit appears to have reacted to the *Mertens* opinion with the same type of confusion that followed Justice Brennan's comments in *Russell, supra*. As discussed, the Sixth Circuit had previously ruled that the tax advantages of plan participation are "*the most significant benefits available under ERISA*." *Warren* v. *Society National Bank, supra* at 982. The Sixth Circuit concluded in this case that the *Warren* court's definition of ERISA benefits was "*implicitly overruled*" by *Mertens*. *Fraser, supra* at 725. The *Mertens* opinion was clearly not intended to cast such a broad shadow.

The *Mertens* Court did not address (either implicitly or explicitly) the issues of whether the tax advantages of plan participation are "*benefits*" under ERISA, or whether ERISA permits damage awards under any of its other remedial provisions. Indeed, the *Mertens* Court specifically restricted its holding to "*the narrow battlefield the parties have chosen*." — whether money damages are available ***under ERISA Section 502(a)(3)***. *Mertens, supra* at ___; 113 S.Ct. at 2067-2068. This Court must provide guidance if it is to prevent further distortions of ERISA's remedial provisions such as occurred in this case when the Sixth Circuit improperly extended *Mertens* to actions brought pursuant to ERISA Section 502(a)(1)(B).

The Sixth Circuit's Opinion is worthy of heightened scrutiny, because it effectively declares that ERISA prevents plan participants and beneficiaries from recovering damages for breach of fiduciary duty in any instance. ERISA Section 502(a)(1)(B) is the only personal remedy available to redress breach of fiduciary duty in the context of ERISA-qualified employee benefit plans.[15] However, the Sixth Circuit has held that, when-

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15 In light of this Court's previous pronouncements in *Russell, supra*, and in *Mertens, supra*, ERISA Section 502(a)(1)(B) is the only

(concluded on page 18)

ever a participant or beneficiary attempts to recover more than an unpaid account balance, the claim is for "*equitable relief.*" *Fraser*, *supra* at 724-725. This Court has held that, under ERISA, equitable relief does not include awards of money damages. *Mertens*, *supra* at ___; 113 S.Ct. at 2069-2070. Therefore, under the Sixth Circuit's reasoning, a plan fiduciary may avoid all of ERISA's fiduciary responsibilities with impunity, so long as the Account Balance is eventually paid.

If certiorari is denied in this case, the Sixth Circuit's erroneous decision will be viewed by other federal courts as the definitive interpretation of ERISA fiduciary liability and, in turn, will lead to additional erroneous decisions throughout the federal court system. This Court must address these issues in order to avoid such an improper and patently unjust result.

(*continued from page 17*)

ERISA section authorizing damage relief. In reality, ERISA Section 502(a)(1)(B) is the only possible remedy for breach of fiduciary duty, because ERISA preempts all other available remedies. ERISA Section 514(a).

CONCLUSION

This Court has indicated on numerous occasions (under contract and trust law principles) that monetary damages are recoverable by ERISA plan participants and beneficiaries for breach of fiduciary duty. However, the lack of any real guidance from this Court in that area has led to widespread confusion in the federal courts. That confusion has, in turn, resulted in a published Opinion from the Sixth Circuit which, if not reversed, will stand for the proposition that money damages are never recoverable under ERISA. This Court must address these issues in order to avoid such an unjust result.

For all of these reasons, Petitioner respectfully prays that the Court grant the writ so that it may properly resolve the issue of fiduciary liability under ERISA Section 502(a)(1)(B).

Respectfully submitted,

By: /s/ BRADLEY D. GORMAN
Counsel of Record for Petitioner

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Dated: September 7, 1995

APPENDIX TO PETITION FOR CERTIORARI

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OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
-Pursuant to Sixth Circuit Rule 24-

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed June 9, 1995)

(MARCIA N. FRASER, Plaintiff-Appellant, v. LINTAS: CAMPBELL-EWALD and THE INTERPUBLIC GROUP OF COMPANIES, INC., Defendants-Appellees — No. 93-2252; ON APPEAL from the United States District Court for the Eastern District of Michigan)

BEFORE: MARTIN, NELSON and NORRIS, Circuit Judges.

ALAN E. NORRIS, Circuit Judge.

This appeal obliges us to decide whether the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, provides a beneficiary of a qualified plan with a cause of action when she suffers adverse tax consequences due to the plan administrator's failure to provide her with timely notice of a "rollover option" as required by the Internal Revenue Code. Because such notice does not constitute a "benefit due to [her] under the terms of [her] plan" as contemplated by ERISA, we conclude that the district court properly dismissed the complaint for failure to state a claim.

I.

Plaintiff, Marcia N. Fraser, received a lump-sum distribution of $173,545 from defendant Interpublic Group of Companies ("Interpublic"), the administrator of a qualified ERISA plan sponsored by defendant Lintas:

Campbell-Ewald ("Lintas"). Plaintiff's ex-husband, Frank Fraser, worked for Lintas, The distribution was the result of a qualified domestic relations order issued on April 11, 1990, by the Circuit Court of Oakland County, Michigan; the order awarded plaintiff fifty percent of the benefits that Mr. Fraser had accrued under the ERISA plan.

On May 4, 1990, Josephine Abramonte, on behalf of Interpublic, mailed a check for $173,545 to plaintiff. The accompanying letter stated that the check "represents the lump sum distribution awarded to you from Mr. Frank Fraser's Interpublic Saving [*sic*] Plan account." The letter went on to say, "[a] statement notifying you of the tax liability on this distribution will be sent to you shortly." No such statement arrived, and plaintiff alleges that, as a result of this oversight, she incurred $28,310 in unnecessary tax liability.

Plaintiff sought to redress this injury by filing a complaint in federal district court on May 4, 1993. The complaint alleges that both Interpublic and Lintas breached the fiduciary duties imposed upon them by ERISA. In the case of Interpublic, the breach allegedly occurred when the company failed to comply with a section of the Internal Revenue Code, 26 U.S.C. § 402(f)(1), that requires a plan administrator to provide written notice of the tax consequences of a distribution to its recipient.[1] With respect to Lintas, the alleged breach was its failure to

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[1] **This provision reads as follows:**

(f) Written explanation to recipients of distributions eligible for rollover treatment.—

(1) In general. — The plan administrator of any plan shall, when making an eligible rollover distribution, provide a written explanation to the recipient —

(A) of the provisions under which such distribution will not be subject to tax if transferred to an eligible retirement plan within 60 days after the date on which the recipient received the distribution.

26 U.S.C. § 406(f)(1)(A) (footnote omitted) (since amended).

adequately monitor the performance of the plan administrator.

In dismissing her complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, the district court characterized plaintiff's claims as equitable in nature. As such, the court found that they were foreclosed by *Mertens* v. *Hewitt Assocs.*, 113 S. Ct. 2063 (1993), in which the Supreme Court declined to read the "equitable relief" language of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), as authorizing an award of money damages.

On review, we believe that *Mertens*, though persuasive, is not dispositive. While it clearly precludes parties from attempting to recover money damages for equitable claims pursuant to § 502(a)(3), *Mertens* did not address claims for breach of contract brought pursuant to ERISA § 502(a)(1)(B). Nonetheless, *Mertens*' stated preference for a narrow reading of the equitable remedies available under ERISA, 113 S. Ct. at 2068, leads us to conclude that money damages are not available under § 502(a)(1)(B) for claims that are equitable in nature.

II.

This court reviews *de novo* the grant of a motion to dismiss based upon the failure to state a claim. *Taxpayers United for Assessment Cuts* v. *Austin*, 994 F.2d 291, 296 (6th Cir. 1993). In assessing the merits of the suit, this court must accept as true the factual allegations contained in the complaint. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993).

Plaintiff contends that defendants breached their statutorily-defined fiduciary duty[2] to her by failing to explain the tax consequences of her ERISA distribu-

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[2] **It is not disputed that both Interpublic and Lintas are fiduciaries within the meaning of ERISA.**

tion.[3] Section 404(a) of ERISA, 29 U.S.C. § 1104, outlines the role of a fiduciary:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use . . . .
>
> * * *
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter . . . .

29 U.S.C. § 1104(a)(1). The complaint alleges that plaintiff never received an explanation of a rollover option, even though the Internal Revenue Code, 26 U.S.C. § 402(f)(1), obligated Interpublic to apprise her of this alternative. Plaintiff argues that the oversight constituted a failure by Interpublic to act in her best interest as a plan beneficiary.[4]

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3 The parties agree that plaintiff qualifies as a beneficiary under ERISA, 29 U.S.C. § 1002(8).

4 She also relies upon Interpublic's alleged failure to fulfill promises made in its Plan Summary to the effect that it would keep participants informed of their rights and benefits. According to plaintiff, Interpublic breached its duty to act "in accordance with the documents and instruments governing the plan," 29 U.S.C.

(concluded on page A-5)

In *Warren* v. *Society Nat'l Bank*, 905 F.2d 975, 981 (6th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991), we construed § 502(a)(3) of ERISA to include the award of monetary damages. Section 502(a)(3) provides as follows:

> [a] civil action may be brought —
>
> * * *
>
> (3) by a . . . beneficiary . . . (B) to obtain other appropriate equitable relief (i) to redress such violations [of the terms of a plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

29 U.S.C. § 1132(a). Seeking guidance from Justice Brennan's concurrence in *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134 (1985), which read the term "equitable relief" to encompass monetary damages, we reasoned that "Justice Brennan's conclusion is correct that under the law of trusts, a beneficiary is entitled to a remedy that will put him in the position he would have been in if the fiduciary had not committed a breach of trust, and that such a remedy includes monetary damages." *Warren*, 905 F.2d at 982.

In *Warren*, the ERISA fiduciary failed to carry out the beneficiary's instructions to distribute all of his assets during the same calendar year. The oversight resulted in an unnecessary tax liability of some $86,000. *Id.* at 976. We determined that the fiduciary breached its contractual duty, expressed in its summary plan description, to "abide by the participant's election of the type of distribution he desires." *Id.* at 980. Because of this error, "[t]he only redress available was damages to

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(*continued from page A-4*)

1104(a)(1)(D), by failing to tell her of the rollover option. As explained hereafter in note 7, however, the Plan Summary contained no promise comparable to that contained in the letter Interpublic sent plaintiff on May 4, 1990 — and the terms of the plan were set forth in the plan documents, including the Plan Summary, not in the letter.

compensate him for the injury caused by the bank's breach of duty." *Id.* at 982. Accordingly, we held, "[i]n light of the plain language of the statute, the common law of trusts, and the role of courts in equity, we find that the damages sought by Dr. Warren are recoverable as 'other appropriate equitable relief' under section 502(a)(3)(B)(i)." *Id.* As this brief summary of *Warren* indicates, more than a passing similarity exists between the case now before us and the facts before the *Warren* court.

The Supreme Court, however, subsequently held that § 502(a)(3) does not include money damages:

> Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages* — monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief.
>
> * * *
>
> . . . Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief *not at all*. We will not read the statute to render the modifier superfluous. . . .

Mertens v. *Hewitt Assocs.*, 113 S. Ct. at 2068-69 (citations omitted) (footnote omitted). In our view, *Mertens* effectively overrules *Warren*.[5]

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5 At least two other circuits anticipated *Mertens* and declined to award money damages pursuant to § 502(a)(3) for a breach of fiduciary duty. *See Novak* v. *Anderson Corp.*, 962 F.2d 757, 760-61 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993); *Lee* v. *Burkhart*, 991 F.2d 1004, 1011 (2nd Cir. 1993).

Plaintiff implicitly recognizes this development inasmuch as she premises her right to monetary recovery on § 502(a)(1)(B). That section reads in part as follows:

> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought —
>
> (1) by a participant or beneficiary —
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a). For this section to apply to her case, of course, we must find that her right to notice of potential lost tax advantager qualifies as a "benefit due" under the terms of the plan.

As the summary plan description provided by Interpublic makes clear, tax savings are an incentive to participate in the plan. Moreover, the summary description highlights the advantages to be gained from use of the "rollover" provision. In our view, however, it strains the overall structure of ERISA[6] to characterize the right to timely notice of the rollover option or the tax advantages associated with that option as benefits due under the plan.

Plaintiff's complaint hinges upon Interpublic's failure to advise her of the rollover option. It does not allege that the plan failed to disburse the correct amount to plaintiff under the terms of the qualified domestic relations order, nor does it contend that anything further is owed by the plan itself as the result of her failure to roll

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6 **Courts consistently describe ERISA as a "comprehensive and reticulated statute." *E.g.*, *Mertens*, 113 S. Ct. at 2066 (citing *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 361 (1980)).**

over the amount received. Furthermore, the "duty" to inform plaintiff of the rollover option was imposed by 26 U.S.C. § 402(f)(1), not by any statements made in the terms of the summary plan description.[7] Because the tax code provides a penalty provision, 26 U.S.C. § 6652(i), for violations of § 402(f)(1), it is difficult to see how Interpublic's alleged breach of that provision denied her a benefit due *under the terms of the plan*, as is required for recovery under ERISA § 502(a)(1)(B). We are not entitled to create a non-statutory remedy for breach of an obligation imposed by § 402(f)(1), the detailed enforcement scheme crafted by Congress having provided "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. at 146, as quoted in *Mertens*, 113 S. Ct. at 2067.

In a case decided before *Mertens*, the eighth circuit reached a similar result when faced with facts nearly identical to those now before us. *Novak* v. *Andersen Corp.*, 962 F.2d 757 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993). The plaintiff in *Novak* alleged that he failed to receive notice of the rollover option and suffered adverse tax consequences as a result. He did not, however, claim that the tax advantages constituted a "benefit due" under the plan; rather, he argued that his tax loss entitled him to equitable relief pursuant to § 502(a)(3)(B) of ERISA, 29 U.S.C. § 1132(a)(3). The eighth circuit endorsed his pleading decision by stating, "Novak's remedy, if he has one, arises under 29 U.S.C. § 1132(a)(3)." *Novak*, 962 F.2d at 759.

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[7] This document contains a section, "Tax Considerations," that describes the tax savings to be derived from rolling over monies received; it does not, however, explicitly promise to keep the beneficiary informed of the workings of this provision. In fact, it advises beneficiaries "to consult with a tax advisor of your own choosing" before deciding "how to receive your Plan payment."

In the case before us, counsel for plaintiff, during the district court's hearing on defendant's motion to dismiss, acknowledged the problem presented by *Mertens*, Plaintiff's counsel stated, "[a]t the time the complaint was drafted Mertems [*sic*] did [*sic*] not come down and we did not have that guidance from the Supreme Court. It's clear now the Supreme Court says there is a legal right somewhere in ERISA and challenging [*sic*] litigants like ourselves to find that right." While we understand plaintiff's reluctance to bring her claim pursuant to § 502(a)(3)(B) in light of *Mertens*, as the eighth circuit recognized, that is the appropriate ERISA provision for an equitable claim such as hers.

For the foregoing reasons, we hold that tax advantages forfeited because of the failure by a fiduciary to provise notice of a rollover option do not constitute a recoverable "benefit due" under § 502(a)(1)(B) of ERISA.

iii.

For the foregoing reasons, the judgment of the district court is **affirmed**.

DEFENDANTS' MOTION TO DISMISS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Proceedings of August 16, 1993)

(MARCIA N. FRASER, Plaintiff, v. LINTAS: CAMPBELL-EWALD, THE INTERPUBLIC GROUP OF COMPANIES, INC., Defendants — CASE NO. 93-CV-71868)

PROCEEDINGS had and taken in the above-entitled matter, before the Honorable BERNARD A. FRIEDMAN, United States District Court Judge for the Eastern District of Michigan, Southern Division, at U.S. Courthouse, 231 W. Lafayette, Room 228, Detroit, Michigan, on Thursday, August 26, 1993, approximately at or about 2:00 o'clock p.m.

APPEARANCES: MARILYN MITCHELL, Esq., Appearing for the plaintiff; NANCY L. HUTCHESON, Esq., Appearing for the Defendants.

(2) Detroit, Michigan
Thursday, August 26, 1993
2:00 o'clock p.m.

THE CLERK: Calling case number 93-71868, *Fraser* versus *LINTAS.*

THE COURT: Okay. How you all doing? May we have appearances, please?

MS. HUTCHESON: Yes, Your Honor, Nancy Hutcheson on behalf of defendants LINTAS: Campbell-Ewald and Interpublic Group of Companies.

THE COURT: Okay.

MS. MITCHELL: Your Honor, Marilyn Mitchell from Evans and Luptak on behalf of plaintiff and nonmoving party Mrs. Fraser. With me here today is Kenneth Franz, who is an expert in the pension area, in case the Court would like to address specific questions in that record.

THE COURT: Thank you.

MS. HUTCHESON: I'm happy to say, Your Honor, I have the same situation as — if we get into ERISA, into much detail, I'm afraid I may be inadequate and —

THE COURT: Well, if we get into ERISA too much I certainly would be in that classification also. Okay. Go on.

MS. HUTCHESON: Your Honor, I am going to get (3) into some of the sections of ERISA, and just for your convenience I am particularly going to cite Section 502(a) of ERISA, which is set forth on page 9 and 10 of our original brief.

THE COURT: My clerk's going to get me the statute. I did bring one with me. I had one sitting on my desk and meant to bring it in and appreciate it. Thanks.

MS. HUTCHESON: As you know, this is a motion by defendants to dismiss the complaint with prejudice. I am not planning to go through in any great detail the argument that was set forth in some detail in both of our briefs that there is no fiduciary duty under ERISA, but would be happy to take questions.

As we set forth in the brief, there is no specific provision of ERISA that requires the dissemination of tax information. What happened here is that Mrs. Fraser was a divorced wife of a LINTAS: Campbell-Ewald employee and received a lump sum distribution.

THE COURT: I understand the facts. Pursuant to a circuit court order as a result of the divorce. I understand all the facts.

MS. HUTCHESON: What she also apparently must have received, and is not at issue in this case, is a (4) summary plan description which we attached to our second brief, which sets forth in some detail the tax concerns a recipient may have upon receipt of a lump sum distribution.

What I think, Your Honor, that we should address today are three cases, particularly the effect of the recent U.S. Supreme Court case of Mertems [*sic*]. And I would like to take you through the three cases I think are the key cases in this situation cited by both plaintiff and defendant.

The three are the U.S. Supreme Court decision in *Massachusetts Mutual* versus *Russell*, which is 473 U.S. 134, 1985 case; then the 6th Circuit's decision in *Warrens* [*sic*] versus *Society National Bank*, 905 F.2d 975, 6th Circuit case from 1990, which is relied upon by plaintiff; and recent decision in June of 1993 by U.S. Supreme Court of *Mertems* versus *Huett* [*sic*] *Associates*, 113 Supreme Court 263, as I said, a June 1993 case.

The reason I think they are important is they eliminate this type of action from being brought, and the reason they do is as follows:

If you turn to page 9, which sets forth Section 502 (a) —

THE COURT: Page 9 of what brief?

MS. HUTCHESON: Original brief, yes, Your Honor. (5) Also in U.S. Code would be 29 U.S.C. 1132(a). That is Section 502(a).

THE COURT: Go on.

MS. HUTCHESON: Okay. That is the section, Your Honor, that provides for civil enforcement. That is the only section that provides for civil enforcement and is the only section relevant in terms of enforcement provisions. Therefore, plaintiff has to find a cause of action for monetary damages under either (a)(1), (a)(2) or (a)(3).

Section 502(a)(1)(4) is an action by a secretary, so it does not apply, as are Sections 5 and 6.

Now, what happened was that in 1985 the Supreme Court in the Russell decision said that a planned participant beneficiary who brings an action under 502(a)(2) — that is relief under Section 409, and 409 is the section for breach of fiduciary's duty, can only bring such action if it's for return of benefits to the plan. In other words, it does not allow for such an action as here.

THE COURT: It's not a private —

MS. HUTCHESON: That's correct.

THE COURT: I understand that argument.

MS. HUTCHESON: So, therefore, plaintiff is only left with two cases, the Warrens decision out of the 6th (6)

Circuit, which is the case they're relying upon — and, Your Honor, I would submit the Warrens decision has been overruled by Mertems. Mertems was, as pointed out in their brief, a section that applied to a nonfiduciary. But for purposes of the argument before you, Your Honor, that is not relevant because section 502(a)(3), which provides that a participant or beneficiary may bring an action against a —

THE COURT: They define equitable and didn't include money.

MS. HUTCHESON: That's correct. They said only applies to mandamus or rejection. Therefore, 503(a)(3) — I apologize for stumbling over these numbers, but 502(a)(3), which was the findings of the Warrens decision, is now no longer applicable to monetary damages. The Warrens decision, to that extent, has been overruled and one is only left with going back to Section 409, which provides that you would make a claim for recovery for benefits to recover for the purpose of the plan.

We do not have a case like that here. There is absolutely no case law that plaintiff has been able to cite where a plaintiff comes in and says, Gee, I would have liked to have gotten some personal tax information. I kept the money. I used the money as I saw fit. And, therefore, you should now pay my taxes.

(7) What I think they're claiming, if I read the brief correctly, is that somehow they are encompassed by Section 502(a)(1)(B). But if we read that section, Your Honor, it says very clearly that it's to recover benefits due to him under the terms of his plan. She admits she has received her benefits. She got her lump sum. There's no question about the amount.

Or to enforce his rights, that would be an injunction. Or to clarify his rights, that would be a declaratory relief. Therefore, 502(5)(1)(a) or (b), neither applies to this action.

To claim that Campbell-Ewald the employer, or Interpublic the parent, the plan administrator, had a duty to

pay her tax benefits, the only limited basis under which that was allowed by the 6th Circuit was in the Warrens decision. And that, as I pointed out, Your Honor, has now been overruled to the extent that it was solely based upon 502(a)(3).

There is nothing in the Warrens decision that says you would reap benefits to include tax advice. That also goes to our alternative argument, Your Honor, which is they have not yet established, nor can they, that there is a breach of a fiduciary duty. There is nothing in ERISA that requires that plan administrator to disseminate such information. In fact, though, in this case it's (8) admitted in the summary plan description attached to the complaint — it was attached to our brief in response — that information was given to Ms. Fraser.

So, where are we? There is no case that I'm aware of in the United States that would say that there's a claim for monetary damages under 502(a)(1)(B), none.

THE COURT: Okay. Thank you.

MS. HUTCHESON: Thank you.

MS. MITCHELL: Your Honor, what you've just been given is the old strawman defense; that is, set up a strawman that the plaintiff didn't plead and knowing it's down. And I think the defendants have done that admirably. Defendants have rightly centered on the section that we aren't dealing to, and that's section 502(5)(1)(b). And defendants again are correct, there has never been a case that has decided that an individual planned participant or beneficiary is entitled to monetary damages in this section.

Similarly, there has never been a case that says a plan beneficiary like Mrs. Fraser is not entitled to monetary damages. In other words, this is a case of first impression. What we know from the decisions on point, which are Russell, Warrens and Mertems that have been addressed to you and discussed by both sides in their briefs, is the sections of ERISA that do not apply.

(9) There has been no decision on 502(a)(1)(B), and we believe that accepting the facts as pled by the plain-

tiffs, which the Court has to do on a 12(b)(6) motion, that those facts justify a cause of action in Mrs. Fraser that warrant the denial of plaintiff's 12(b)(6) motion for dismissal.

Let me just run through our argument very briefly. Dismissal's appropriate where no genuine issue of material fact exist[*s*].

Well, actually there are questions of fact at issue and one was just raised; that is, whether Mrs. Fraser was given plan documents —

THE COURT: They're assuming for their argument —

MS. MITCHELL: However, they nonetheless raised it.

THE COURT: But they're assuming for purposes of this that it was never given. They've said that in their briefs.

MS. MITCHELL: They didn't say it in oral argument.

THE COURT: I think they mentioned it. In fact, I know they did in their brief.

MS. MITCHELL: Summary plan document, however, was never given. So, then accepting plaintiff's facts as (10) true, it's clear that she stated a claim for relief under ERISA Section 502(a)(1)(B) because these are the facts.

First of all, the plan at issue here is Qualified Employee Benefit Plan under ERISA.

Fact 2. The employer is the sponsor and the named plan fiduciary.

3. The other defendant, Interpublic, is the — as the plan administrator is the fiduciary of the plan.

4. Mrs. Fraser is a beneficiary of the plan.

5. Interpublic and the employer, as fiduciaries of the plan, owed duties of at least ordinary carry [*sic*] to Mrs. Fraser.

Now, under section 404 — ERISA 404, which is 29 U.S.C. section 1104:

> "A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, and;

"A. For the exclusive purpose of;

"1. Providing benefits to participants and their beneficiaries."

Now, we contend that it was the fiduciary duty of the plan administrator and the employer to give notice to Mrs. Fraser of the tax consequences of accepting a lump sum payment and not rolling it over into an IRA within 60 days. Warrens finds for that —

(11) THE COURT: Even if there was a fiduciary duty, for purposes of this argument, there's nothing that would provide for money damages.

MS. MITCHELL: No. Your Honor. Under 502(1)(a)(B) tested, but not found lacking, there is a provision for monetary damages for their failure to give her the benefits.

We're not asking, as the defendants argue, that the plan administrator come up and pay her taxes. We're not saying that at all. We're saying tax deferred benefits are one of the benefits under the ERISA plan. That's stated by the plan administrator in their own plan documents.

One of the reasons you have a plan is to have tax deferment. That in itself is a benefit under the plan and that is what Warrens found also. I quote the Warrens decision 905 F.2d, page 982, where Warrens was charging that:

> "By —" "—plan administrator's negligence, it acted in such a way as to deprive him, Warrens, of a benefit to which he was entitled under the plan, thereby —"

THE COURT: It says "benefit."

MS. MITCHELL: Correct.

THE COURT: But it doesn't say benefit, to me, (12) also tax advantages.

MS. MITCHELL: Tax deferral is in itself a benefit of the plan. It says that right in their own plan documents. That's why one enters into a plan under ERISA 401K or any other type of plan to defer taxes. That is something

that the plan administrator trumpets, tax considerations. One of the benefits under the plan is tax deferral. Later on, not only do we say they breached their fiduciary duty under the appropriate section of ERISA, but in fact contractually — under their own plan — they provide that you also have a right — this is addressed to the beneficiary or participant — you also have a right to expect fiduciary people responsible for management of the plan to act prudently and in the best interest of participants in the plan.

We contend it's certainly in the best interest of beneficiaries of the plan to advise the beneficiaries of and give them their full tax deferral benefits —

THE COURT: But the roll over provision is part of a statutory scheme as opposed to the plan itself, isn't it? The plan itself is to defer taxes, but the roll over provision is a provision in the Internal Revenue Codes that would allow somebody to do something if, in fact, they are out of the plan.

MS. MITCHELL: That's correct, Your Honor. (13) They're also contending we're saying, because the Internal Revenue Code requires the fiduciary to let the beneficiary know the roll over provision, we're claiming since they violated the Internal Revenue code they have per se violated ERISA —

THE COURT: Except that the Internal Revenue Code provides specific penalties and provisions for that $10.00, whatever it is. I forgot what it was. Ten bucks or something like that. So the statutory scheme of that was anticipated by the legislature and the legislature said, if there is a violation, here's what the penalties will be.

MS. MITCHELL: That doesn't do the plan beneficiary any good because they have no private action under the code. Rather ERISA comes in and says, if your fiduciary violates fiduciary duties to you by not giving you a benefit you're entitled to, then you have a private right of action. That, Your Honor, has not been tested.

But the Supreme Court in Russell and in Mertems says there's a legal right here, and it's not in either of

the sections that these are — particular plaintiffs pled, but there is a legal right and that's what Mertems says. So Mertems doesn't overrule Warrens all together. We're talking of different sections of the plan.

There has never been a decision and they — (14) defendants admit this — that addresses our precise argument, which is that under 502(a)(1)(B) our client, Mrs. Fraser, the beneficiary, has a right to compensatory damages. Wouldn't it be in the best interest of the fiduciary or beneficiary for the fiduciary to tell her, Look it, you're going to have a $28,000 tax hit if you don't roll this over?

Now, the fact that ERISA doesn't say precisely thou shall advise of a roll over provision doesn't mean it isn't there. There are a lot of things that fiduciaries must do in the best interest of the beneficiary that aren't spelled out.

THE COURT: Let me ask you this question. You also indicated that you may be serious of amending your complaint, depending on what we talk about here. If you did so, how would you amend your complaint?

MS. MITCHELL: I think it would be more specific with respect to Section 502(a)(1)(B) and plead more specific facts. At the time the complaint was drafted Mertems did not come down and we did not have that guidance from the Supreme Court. It's clear now the Supreme Court says there is a legal right somewhere in ERISA and challenging litigants like ourselves to find that right. You can see clearly the Court says there is such a right.

(15) Frankly, Your Honor, I did not draft this complaint. But we would amend it in such a way that we would make our claims much clearer. Right now albeit they're a bit fuzzy, that is because of the circumstances of the law at the time the complaint was drafted.

I believe that we should at least be allowed to amend, state it more clearly, although I do think defendants have gotten the point.

THE COURT: Okay. Thank you.

In this matter the Court has had an opportunity to review this case and spend some time on it. In fact,

considerable amount of time because it had some interesting issues, and ERISA is always an interesting issue because it's always — as I think both counsel have indicated — the kind that unless you're a practitioner in ERISA you're probably like all the rest of us, have to really struggle to understand a lot of things about ERISA, and I'm one of those persons that has to do that.

A couple things. Number one, the Court believes the motion should be granted for the following reasons:

The mere fact that there is no cases [*sic*] I don't think in and of itself should be a reason, because otherwise no cases about lots of things — and we have to make decisions every day based upon reason and common sense and statutory schemes and so forth.

(16) But the Court is involved in this particular matter, in reading the primary cases, that the relief requested by the defense in this particular matter should be granted; that all roads lead to that conclusion.

The fact that the statutory scheme shows it's not a 502(5)(1)(a) action. It's a plan as — as to certain sections.

The fact — most recent case, I think the Mertems case, pretty much does put a lot of the questions to rest.

As to the equitable relief as opposed to the money damages. I think that the whole scheme, even the IRS Code in terms of indicating what the relief was, would lead this Court to conclude — from both the case law as well as the statutory law — that there really is not a cause of action, though I understand the emotional part of it and don't necessarily disagree with the emotional part of it, but I don't think that I can sit here and extend that — those provisions where they just simply don't extend and where the courts have spoken pretty analogous to the kinds of situations that we're talking about here.

As to — I'm a very strong believer in terms of allowing amendments of pleadings and I think that they

should be granted very freely. But if the reason for it is just to clarify some things, I have taken the position (17) that the factual allegations that have been made in this particular matter are true and the defense haven't really objected to that. In their brief they have said, for purposes of this argument, I don't think that I would be really doing anyone a favor because we're assuming that all the allegations are clear and all of the allegations are true.

So, in reaching the conclusion that I reached, and also the conclusion that the defendants' brief reached, so for those reasons the Court will grant the motion and will deny the motion for — motion for amendment of the pleadings.

Thank you.

MS. HUTCHESON: Thank you, Your Honor. Shall I present an order?

THE COURT: We'll do the order.

MS. HUTCHESON: Thank you.

THE COURT: I probably shouldn't say this. The other thing we went around and around about the other day — but I think definitely as beneficiary in a plan — was [*sic*] the definitions, because it was court-ordered — and I'm just thinking out loud — because we put so much time in going over this whole thing that we got into the definition clauses too. I think she was definitely a (18) beneficiary because at one time or another she was named.

MS. MITCHELL: Is that part of the ruling?

THE COURT: No, I'm just telling you what we went through in terms of our analysis of the whole case just trying to look for some way — because it is new law — some way of being able to do something. Anyhow . . .

MS. MITCHELL: Well, thank you.

MS. HUTCHESON: Thank you, Your Honor.

(*Matter concluded*)

EXCERPTED STATUTORY PROVISIONS

ERISA SECTION 404

FIDUCIARY DUTIES

Act Sec. 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or Title IV.

* * *

ERISA SECTION 502(a)

CIVIL ENFORCEMENT

Act Sec. 502. (a) A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights

under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A)); or

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1), (A) to enjoin any act or practice which violates subsection (f) of section 101, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

* * *

INTERNAL REVENUE CODE

26 U.S.C. § 402(f)(1)

(f) Written explanation to recipients of distributions eligible for rollover treatment.—

(1) In general.—The plan administrator of any plan shall, when making a[5] eligible rollover distribution, provide a written explanation to the recipient —

(A) of the provisions under which such distribution will not be subject to tax if transferred to an eligible retirement plan within 60 days after the date on which the recipient received the distribution, and

(B) if applicable, the provisions of subsections (a)(2) and (e) of this section.

* * *

TREASURY REGULATION

§ 1.402(f)-1 (1990)

§ 1.402(f)-1 Required explanation of rollovers, capital gains, and the separate tax on lump sum distributions.

(a) *General rules.* Section 402(f) requires plan administrators to give recipients of certain distributions a written explanation of the rules relating to the taxation of certain amounts as capital gains under section 402(a)(2), the separate tax on the ordinary income portion of lump sum distributions under section 402(e), and the exclusion from gross income under section 402(a)(5) for amounts rolled over into eligible

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[*Printer's Note*]: **Footnote omitted in this reproduction.**

retirement plans. This notice must be provided to the recipient of any qualified total distribution or any partial distribution satisfying section 402(a)(5)(D)(i) that is made after December 31, 1984, not later than two weeks after the distribution is made.

JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated August 27, 1993)

(MARCIA N. FRASER, Plaintiff, v. LINTAS: CAMPBELL-EWALD and THE INTERPUBLIC GROUP OF COMPANIES, INC., Defendants — Civil Action No. 93-CV-71868-DT; HON. BERNARD A. FRIEDMAN)

The court has granted defendants' motion to dismiss the complaint for failure to state a claim. Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be, and hereby is, entered for defendants and against plaintiff.

JOHN P. MAYER
CLERK OF COURT

By: /s/ JUDIE BIRDSALL
DEPUTY CLERK

Approved: BERNARD A. FRIEDMAN
U.S. DISTRICT JUDGE

Dated: AUG 27 1993

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated August 27, 1993)

(MARCIA N. FRASER, Plaintiff, v. LINTAS: CAMPBELL-EWALD and THE INTERPUBLIC GROUP OF COMPANIES, INC., Defendants — Civil Action No. 93-CV-71868-DT; HON. BERNARD A. FRIEDMAN)

On August 26, 1993, this matter came before the court on defendants' motion to dismiss. The court has reviewed the parties' written submissions and heard oral argument. For the reasons stated on the record,

IT IS ORDERED that defendants' motion to dismiss is granted.

/s/ BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: AUG 27 1993
Detroit, Michigan

Supreme Court, U.S.
FILED
OCT 10 1995
CLERK

No. 95-455

In The

Supreme Court of the United States

October Term, 1995

MARCIA N. FRASER,

Petitioner,

vs.

LINTAS: CAMPBELL-EWALD and THE INTERPUBLIC GROUP OF COMPANIES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals correctly affirm dismissal of Petitioner's complaint by holding that notice of a rollover option in connection with an ERISA plan lump sum distribution is not a "benefit due" under ERISA's claim for benefits provision, 29 U.S.C. § 1132(a)(1)(B)?

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS OF RESPONDENTS

Subsidiaries and companies of which Respondents directly or indirectly have less than total ownership[1] include the following:

Alice SNC France
Baader-Lang-Behnken GmbH
Cato Design, Inc.
Conte/McCann-Erickson de Panama S.A.
Creation Sarl
Delacroix S.A.
Direct Creations S.A.
Encuadre S.A.
Europa Immagine & Communicazione Srl
Fab + S.A.
Grafika Lintas Reklamcilik A.S.
Hakuhodo Lintas K.K.
Inciativas De Meios-Actividades Publicitarias, Limitada
Initiative Media London Limited
ITI McCann-Erickson International Advertising
JSC McCann Direct
Lintas (Private) Limited
Lintas Direct B.V.
Lintas Budapest Reklam es Marketing Kommunicacios Kft
Lintas (Thailand) Ltd.
Lintas GulfLimited
Lintas - Abidjan
Lowe RZR S.A. Lowe Dospordos S.A.
The Martin Agency, Inc.
McCann-Erickson (Kenya) Limited

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1. A number of inactive subsidiaries and other subsidiaries, all of which considered in the aggregate as a single subsidiary would not constitute a significant subsidiary, are omitted from this list.

McCann-Erickson (Ecuador) Publicidad S.A.
McCann-Erickson Publicidad De Venezuela, S.A.
McCann-Erickson Payne, Golley Ltd.
McCann-Erickson Guangming Advertising Limited
MPM Lintas Communicacoes Ltda.
Mutiara-McCann (Malaysia) Sdn. Bhd.
Pirella Gottsche Lowe S.p.A.
PMI - Mediaporssi Oy
Premantle Hellas
Publi Media Service
SFA S.A. France
SP3 Lyon S.A.
SP3 Conseile Paris S.A.
Sprint Advertising S.A.
Underline Design Group Pty. Limited

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APPENDIX

Appendix A — Savings Plan Booklet 1a

No. 95-455

In The

Supreme Court of the United States

October Term, 1995

MARCIA N. FRASER,

Petitioner,

vs.

LINTAS: CAMPBELL-EWALD and THE INTERPUBLIC GROUP OF COMPANIES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Lintas: Campbell Ewald and Interpublic Group of Companies, Inc. respectfully pray that the Petition for Writ of Certiorari from the June 9, 1995 opinion and judgment of the United States Court of Appeal for the Sixth Circuit filed by Marcia N. Fraser be denied.

STATUTES INVOLVED

Respondents rely on the same provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, and the Internal Revenue

Code, 26 U.S.C. § 402(f)(1), as relied upon by Petitioner. References to ERISA are designated "ERISA Section ___" and references to the Internal Revenue Code are designated "Section ___ of the Internal Revenue Code."

COUNTER-STATEMENT OF THE CASE

Petitioner appeals from an August 27, 1993 judgment and order granting Respondents' motion to dismiss, which was affirmed by the Sixth Circuit Court of Appeals on June 9, 1995. Petitioner claims that Respondents LINTAS: Campbell-Ewald ("Lintas") and The Interpublic Group of Companies, Inc. ("Interpublic") (collectively "Respondents") breached a fiduciary duty under ERISA by failing to provide Petitioner notice of a rollover option. Petitioner seeks money damages under ERISA Section 502.

Interpublic is the plan administrator for The Interpublic Group of Companies Savings Plan, an employee retirement plan governed by ERISA. Lintas is a wholly-owned subsidiary of Interpublic. Petitioner is the former wife of a Lintas employee.

On May 4, 1990, pursuant to a qualified domestic relations order, Interpublic issued a check to Petitioner in the amount of $173,545, representing a lump sum distribution awarded to Petitioner from her former husband's Interpublic Savings Plan account. There is no dispute that Petitioner received and cashed the check. For purposes of Respondents' motion in the district court only, they did not challenge Petitioner's contention that she failed to receive notice of a rollover option relating to the distribution from the Savings Plan.[2]

---

2. A rollover, authorized under certain circumstances by the Internal Revenue Code ("IRC"), is the transfer of a distribution to an eligible retirement plan, including an Individual Retirement Account ("IRA"), within 60 days of the distribution, thus avoiding tax at the time of the distribution.

To this point, Respondents and Petitioner generally agree on the factual history. The parties diverge, however, on the characterization of the source of the obligation to provide notice of the rollover option and the effect of this obligation on Petitioner's claim for benefits due under ERISA Section 502(a)(1)(B).

Petitioner asserts that Respondents were required to notify her of her investment options within two (2) weeks of the distribution under the qualified domestic relations order, stating that this notice requirement arose under ERISA and the Internal Revenue Code. Petition for Writ of Certiorari, p. 3. In support of this proposition, Petitioner cites *only* Section 402(f)(1) of the Internal Revenue Code. Conspicuously absent is reference to any section of ERISA requiring provision of notice of the rollover option. ERISA contains no such requirement.

Respondents assert that ERISA contains no requirement to provide notice of the rollover option. Although ERISA recognizes certain tax advantages to selection of the rollover option, it does not specifically mandate provision of such notice. The only source of this notice is the Internal Revenue Code.

In May 1993, Petitioner filed a complaint in the United States District Court for the Eastern District of Michigan, Southern Division, against Interpublic and Lintas. In Count I, Petitioner alleged that Interpublic breached a fiduciary duty under ERISA Section 404(a) (setting forth a fiduciary's prudent man standard of care) by failing to give her notice of the rollover option. Petitioner claimed that as a result of allegedly failing to receive such notice from Interpublic, she failed to rollover her distribution to an IRA within the required time and incurred damages in the form of additional tax liability of approximately $28,000. In Count II, Petitioner alleged that Lintas had a duty to monitor the performance of Interpublic, but failed to insure that

Interpublic performed its duties as plan administrator in accordance with ERISA. Petitioner alleged that this failure violated Respondent Lintas' duties under ERISA Sections 404 and 405.

In June 1993, Respondents filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Respondents' motion asserted that the complaint failed to state a valid claim for relief because (1) Petitioner had no cause of action under ERISA Section 502(a)(1)(B) for monetary damages; and (2) Respondents owed Petitioner no duty under ERISA to give notice of a rollover option. Respondents' motion was heard on August 26, 1993 by the Honorable Bemard A. Friedman.

The district court granted Respondents' motion and entered judgment in Respondents' favor. The district court held that Petitioner had no cause of action for monetary damages under ERISA Section 502(a)(1)(B) and that Petitioner owed no duty under ERISA to provide Petitioner notice of the rollover option. (Transcript, pp. 15-17). The district court entered judgment and an order granting Respondents' motion on August 27, 1993.

Petitioner filed a timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit on September 21, 1993. Oral argument was held by the Sixth Circuit on October 7, 1994. Petitioner argued that Respondents breached their fiduciary duties to Petitioner under ERISA Section 404 by failing to act in Petitioner's best interests, and that Petitioner, who conceded that she had been distributed all she was entitled to under and from the plan, was nevertheless entitled to recover damages for lost tax benefits as "benefits due under the plan pursuant to ERISA Section 502(a)(1)(B). Petitioner relied extensively on *Warren v. Society National Bank,* 905 F.2d 975

(6th Cir. 1990), *cert. denied*, 498 U.S. 1080, 111 S. Ct. 2256, 114 L. Ed. 2d 709 (1991). Respondents argued that Petitioner could not recover for a breach of fiduciary duty because she was proceeding individually and not on behalf of the plan and that notice of the rollover option is not a "benefit due under the plan" as required for recovery under ERISA Section 502(a)(1)(B). Respondents addressed *Warren, supra,* noting that it had been overruled by *Mertens v. Hewitt Assocs.*, __ U.S. __ , 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993), and was thus inapplicable.

On June 9, 1995, the Sixth Circuit affirmed the district court's dismissal. *Fraser v. Lintas: Campbell-Ewald,* 56 F.3d 722 (6th Cir. 1995). The Sixth Circuit appropriately analyzed the case under ERISA Section 502(a)(1)(B), refusing to be dragged into clearly inapplicable breach of fiduciary duty issues. The court held that the summary plan description did not contractually bind Respondents to provide the rollover notice and that it would be an impermissible extension of the concept of "benefits due under the plan" to characterize such notice as a benefit due, especially where Petitioner received all she was entitled to from the plan. The *Fraser* court refused to create an ERISA cause of action based on Section 402(f)(1) of the Internal Revenue Code, finding such an extension contrary to ERISA and existing law. Since notice of the rollover option could not be characterized as a benefit due under the plan, the *Fraser* court concluded that the remedy sought by Petitioner was equitable in nature and could only be pursued under ERISA Section 502(a)(3).

SUMMARY OF ARGUMENT

Petitioner has demonstrated no reason to grant a writ of certiorari. She has not demonstrated that the decision of the United States Court of Appeals for the Sixth Circuit conflicts with decisions of this Court or any other circuit, nor has she shown that the case involves an important question of federal law necessitating resolution by this Court.

Petitioner has no claim for breach of fiduciary duty because she seeks individual relief as opposed to damages on behalf of the plan. Notice of a rollover option is not a "benefit due under the plan" as required for recovery under ERISA Section 502(a)(1)(B). The benefits due Petitioner were a lump sum distribution of $173,545, which she received.

Petitioner makes no claim that she did not receive all she was entitled to from the plan, thus negating ERISA Section 502(a)(1)(B) as a source of recovery. Since Petitioner proceeded under ERISA Section 502(a)(1)(B), the lower courts properly dismissed her complaint.

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT'S OPINION DOES NOT CONTRADICT DECISIONS OF THIS COURT, NOR DOES IT CONFLICT WITH DECISIONS FROM OTHER COURTS OR RAISE IMPORTANT ISSUES REQUIRING RESOLUTION BY THIS COURT.

The Sixth Circuit's decision is not unique or otherwise aberrational. It does not do violence to ERISA or its legislative purposes, nor does it conflict with decisions of this Court or the lower courts. On the contrary, the decision correctly analyzes and applies ERISA, refusing to rewrite or emasculate the detailed statutory enforcement scheme created by Congress in ERISA Section 502(a).

A. The Sixth Circuit Appropriately Analyzed Petitioner's Claim Under ERISA Section 502(a)(1)(B).

ERISA's civil remedies provision, found in ERISA Section

502(a), lists the causes of action available to ERISA plan participants and actions subject to enforcement by the Department of Labor. Only Sections 502(a)(1)-(3) are germane here; they provide:

> Civil enforcement
>
> (a) Persons empowered to bring a civil action. A civil action may be brought—
>
> (1) by a participant or beneficiary;
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under Section 409 [29 U.S.C. § 1109];
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such

> violations or (ii) to enforce any provision of this title or the terms of the plan;

ERISA Section 502(a), then, recognizes three relevant causes of action: (1) a claim for benefits due under ERISA Section 502(a)(1)(B); (2) a claim for breach of fiduciary duty under ERISA Section 502(a)(2); and (3) a "catch all" provision for injunctive or "other appropriate equitable relief" under ERISA Section 502(a)(3). Petitioner's complaint failed to particularize which provision she was relying on, but she subsequently specified ERISA Section 502(a)(1)(B), *see Fraser, supra* at 725, a position confirmed in her Petition to this Court. *See* Petition for Writ of Certiorari, pp. 5, 19.

This election was the only available option for Petitioner. Since Petitioner sought damages to herself as an individual, as opposed to on behalf of the plan, she was precluded from asserting a breach of fiduciary duty claim under ERISA Section 502(a)(2). *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-44, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985). *Accord Richards v. General Motors Corp.*, 991 F.2d 1227, 1231 (6th Cir. 1993).

In her pleadings, below and to this Court, Petitioner has continually muddied the record by injecting breach of fiduciary duty concepts under ERISA Section 404. The confusion created by assertion of concepts of breach of fiduciary duty has been exacerbated by Petitioner's reliance on Section 402(f)(1) of the Internal Revenue Code, either as an independent or supplemental basis for an alleged breach of fiduciary duty. *See* Petition for Writ of Certiorari, p. 5 n.4.

This is *not* a breach of fiduciary duty claim, nor could it be, given Petitioner's request for individual relief as opposed to

damages on behalf of the plan. *Russell, supra*. Moreover, courts have rejected efforts to blur or collapse the statutory distinction between a breach of fiduciary duty claim and a claim for benefits under ERISA, holding "that a beneficiary may not bring a claim for breach of fiduciary duty under § 1132(a)(1)(B)." *Richards v. General Motors Corp.*, 850 F. Supp. 1325, 1336 (E.D. Mich. 1994). *See also, Anwieler v. American Elec. Power Service Corp.*, 3 F.3d 986, 992 (7th Cir. 1993); *Simmons v. Southern Bell Tel. Co.*, 940 F.2d 614, 617 (11th Cir. 1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 n.7 (3rd Cir. 1990); *McMahon v. McDowell*, 794 F.2d 100, 109-11 (3rd Cir.), *cert. denied*, 479 U.S. 971, 107 S. Ct. 473, 93 L. Ed. 2d 417 (1986).

Since Petitioner sought damages individually and expressly relied on ERISA Section 502(a)(1)(B), references to ERISA's fiduciary duty standards are irrelevant. The Sixth Circuit recognized the inapplicability of ERISA's fiduciary duty standards to this case by analyzing Petitioner's claim exclusively under the claim for benefits provision of ERISA Section 502(a)(1)(B).

Similarly, reliance on ERISA Section 502(a)(3) as a basis for recovering lost tax savings beyond what was required to be distributed under the plan was foreclosed by *Mertens v. Hewitt Associates*, __ U.S. __, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993). *Mertens* held that money damages are not __ U.S. at __, 113 S. Ct. at 2068-69, 124 L. Ed. 2d at 169-70.

B. Notice Of A Rollover Option And Associated Tax Advantages Is Not A "Benefit Due Under The Plan" Under ERISA Section 502(a)(1)(B).

After citing ERISA Section 502(a)(1)(B), the Sixth Circuit cogently stated the issue in this case:

> For this section to apply to her case, of course, we must find that her right to notice of potential lost tax advantages qualifies as a "benefit due" under the terms of the plan.

Fraser, supra at 725.

In resolving this issue, the *Fraser* court considered the summary plan description, the potential impact of Section 402(f)(1) of the Internal Revenue Code and relevant case law. Based on this thorough and integrated analysis, the court concluded that:

> it strains the overall structure of ERISA to characterize the right to timely notice of the rollover option or the tax advantages associated with that option as benefits due under the plan.

Fraser, supra at 725.

The *Fraser* court rejected Petitioner's contention that the summary plan description contractually bound Respondents to advise plan participants of the tax implications of rolling over an account or failing to do so, noting that the summary plan description merely described potential tax savings from participation in an ERISA plan and specifically recommended that beneficiaries "consult with a tax advisor of [their] own choosing" before accepting a plan payment. *Fraser, supra* at 726 n.7. The summary plan description is reproduced at Respondents' Appendix 1a to 29a. The *Fraser* court likewise rejected Petitioner's reliance on a letter accompanying the distribution, indicating that "a statement notifying you of tax liability on this distribution will be sent to you shortly," which Petitioner argued supported her claim that Respondents were contractually bound

to provide notice of the rollover option. The court found that "the terms of the plan were set forth in the plan documents, including the Plan Summary, not in the letter." *Fraser, supra* at 724 n.4. This is consistent with the holding of a number of courts, which have refused to permit "the written terms of a plan [to] be modified or superseded by oral assurances or other extrinsic evidence." *Gordon v. Barnes Pump, Inc.*, 999 F.2d 133, 137 (6th Cir. 1993), citing *Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993); *see also, Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 59 (4th Cir. 1992), *Musto v. American Gen. Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S. Ct. 1745,104 L. Ed. 2d 182 (1989).

There was no contractual agreement to provide notice of the rollover option in the summary plan description or other plan documents. Similarly, there is no provision in the ERISA fiduciary duty standards requiring such notice.

The duties of a plan fiduciary are enumerated in ERISA Section 404. ERISA Section 404(a) requires that plan fiduciaries discharge their duties solely in the interest of the participants and beneficiaries," and that they do so in a "prudent" manner. These general obligations are supplemented by specific proscriptions in ERISA Section 406, which lists certain prohibited transactions" not relevant to this case.

ERISA imposes fiduciary duties upon the plan administrator to distribute to all participants and beneficiaries a summary plan description, plan descriptions and annual reports. ERISA Sections 101-104. In addition, upon the request of a participant or beneficiary, the administrator must supply a statement of total benefits accrued. ERISA Section 105.

Nowhere does ERISA require that a plan administrator provide notice of a rollover option. Courts have refused to require

plan administrators to provide information beyond what is specifically mandated by ERISA. *Stahl v. Tony's Building Materials*, 875 F.2d 1404, 1409 (9th Cir. 1989) (plan administrator had no duty to provide information in a summary plan description beyond what is specifically required by the disclosure provisions). *See also, Farr v. U.S. West, Inc.*, 815 F. Supp. 1364, 1369 (D. Ore. 1992).

Absent a promise in the plan documents or an express ERISA provision requiring the rollover notice, the Sixth Circuit correctly held that the rollover notice did not constitute a benefit due under the plan. Significantly, the *Fraser* court noted that Petitioner did not contend that she failed to receive the amount due her under the qualified domestic relations order or that the plan owed her anything more than she had received. *Fraser* at 725-26.

Petitioner did not and cannot dispute this fact. She received what she was entitled to from the plan. The "benefits due [her] under the plan" were provided. Implicit in the Sixth Circuit's ruling is recognition that the remedies available under Section 502(a) provide the exclusive remedies under ERISA. *Russell*, 473 U.S. at 146-47, 105 S.Ct. at 3092-93, 87 L.Ed.2d at 106-107. The explicit enforcement scheme of ERISA is "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.*

The *Fraser* court also rejected petitioner's reliance on Section 402(f)(1) of the Internal Revenue Code as supportive of her claim that she was denied a benefit due under the plan. The court noted that the tax code contains a penalty provision and it is improper to disregard Congress' extensive enforcement scheme in ERISA by engrafting remedies not expressly authorized by the statute. *Fraser, supra*, at 726.

This is not a novel concept or conclusion. The tax code contains no private right of action for enforcement. Enforcement of the tax code is within the jurisdiction of the Secretary of Treasury and the Internal Revenue Service, and even then must be authorized by Section 7401 of the Internal Revenue Code. *United States ex rel. v. Namibia v. African Fund,* 588 F. Supp. 1350, 1351 (S.D.N.Y. 1984). The Internal Revenue Service's authority includes the power to assess penalties for noncompliance with the Code. *See* 26 U.S.C. Section 6671(a). More specifically, Section 6652(i) of the Internal Revenue Code provides penalties for failure to provide notice of the rollover option under Section 402(f)(1) of the Internal Revenue Code; neither this provision directly nor the Internal Revenue Code elsewhere authorizes a private cause of action for noncompliance with the notice provision.

Further, there is no implied cause of action under ERISA based upon the tax code. In *Trenton v. Scott Paper Co.*, 832 F.2d 806 (3rd Cir. 1987), the court refused to imply a private cause of action under ERISA based upon tax code provisions. Plaintiffs, employees excluded from an early retirement plan, contended that defendants' creation of a "top-heavy plan" within the meaning of the tax code, which resulted in a loss of tax benefits to the employees, violated ERISA. The Third Circuit rejected plaintiffs' claim, stating:

> Appellants cite no provision of ERISA indicating that the creation of a top-heavy plan violates ERISA. The mere fact that ERISA sets forth requirements for qualification of plans does not lead one to conclude that the failure of a plan to meet these requirements is a "violation" of ERISA.

Id. at 810. Since Petitioner can point to no provision in ERISA

providing that failure to give notice of a rollover option violates the statute and since there is no authority for implying a cause of action based on requirements of the tax code, the court correctly rejected Petitioner's reliance on ERISA's fidiciary duty standards and Section 402(f)(1) of the Internal Revenue Code as supportive of a claim for benefits under ERISA Section 502(a)(1)(B).

Finally, the *Fraser* court analyzed the only case potentially on point, *Novak v. Andersen Corp.*, 962 F.2d 757 (8th Cir. 1992), *cert. denied*, __ U.S. __ , 113 S. Ct. 2928, 124 L. Ed. 2d 678 (1993). The Sixth Circuit, noting distinctions in *Novak*, nevertheless agreed with its conclusion that the "remedy, if [Petitioner] has one, arises under 29 U.S.C. § 1132(a)(3)," *Fraser, supra* at 726, quoting *Novak*, 962 F.2d at 759, because the relief sought was equitable in nature, not a benefit due under the plan.

The "equitable" nature of the relief requires reliance on ERISA Section 502(a)(3). The relief is equitable because Petitioner does not seek a "benefit due under the plan" (*i.e.*, she received all she was entitled to under and from the plan), but losses above and beyond what she was entitled to under the plan. *See infra* at 11-13.

The Sixth Circuit's opinion does not rewrite ERISA, contravene this Court's prior decisions or create a conflict in the circuits. It is a straightforward application of ERISA which refuses to expand the remedies provided by Congress. There is no significant jurisprudential reason for acceptance of Petitioner's Writ, and this Court should reject Petitioner's invitation.

II.

THE SIXTH CIRCUIT'S *WARREN* DECISION HAS NO BEARING ON THIS CASE.

Petitioner places much emphasis on the Sixth Circuit's decision in *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 498 U.S. 1080, 111 S. Ct. 2256, 114 L. Ed. 2d 709 (1991). *Warren* stated that the loss of tax benefits is athe loss of one of the most significant benefits available under ERISA." *Warren, supra* at 982.

Warren is clearly distinguishable from this case. Moreover, it has been criticized by numerous courts of appeal, including the Sixth Circuit, which first narrowed its holding and later, in this case, found it to be effectively overruled by *Mertens, supra.*

Initially, *Warren* involved a claim under ERISA Section 502(a)(3), *not* ERISA Section 502(a)(l)(B), and, in the Sixth Circuit's own words, created only "a narrow exception" permitting recovery of monetary damages under ERISA Section 502(a)(3). Subsequent to issuance of *Warren*, the Sixth Circuit clarified its *Warren* decision, stating that *Warren* had:

> found a narrow exception to this rule [the Supreme Court's holding in *Russell* prohibiting extracontractual damages based on any fiduciary provisions of ERISA]. We approved *Warren's* ERISA claim against the defendant bank because it had violated *an express contractual agreement* with him, subjecting him to tax liability. *We agree with the district court that a breach of a contractual duty is required for liability to attach under § 1132(a)(3) [§ 502(a)(3)]."*

Richards v. General Motors Corp., et al., 991 F.2d 1227, 1231 (6th Cir. 1993) (emphasis supplied). Petitioner ignores the fact that *Warren* was based on ERISA Section 502(a)(3) and was premised solely on the breach of an express contractual duty. Here, ERISA Section 502(a)(3) was not pled and no contractually based duty existed.

Moreover, before *Mertens, Warren* had been consistently rejected by other courts of appeal. *See Harsch v. Eisenber,* 956 F.2d 651, 656 (7th Cir.), *cert. denied,* __ U.S. __ , 113 S. Ct. 61, 121 L. Ed. 2d 29 (1992); *Leo v. Burkhart,* 991 F.2d 1004, 1008 (2nd Cir. 1993); *Novak v. Andersen Corp.*, 962 F.2d 757, 761 (8th Cir. 1992);[3] *Lafoy v. HMO Colo.*, 988 F.2d 97, 100 (10th Cir. 1993). The courts rejecting *Warren's* expansive reading of ERISA Section 502(a)(3) were correct. This Court's holding in *Mertens* put any controversy to rest. The effect of *Mertens* was recognized by the *Fraser* court, which held that "*Mertens* effectively overrules *Warren*." *Fraser* at 725.

Inexplicably, Petitioner does not cite this contrary authority to the Court. Instead, she asserts that " [o]ther federal courts have agreed with the *Warren* court's reasoning, and recognized that tax advantages are 'benefits' due under ERISA plans," citing *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1337 (5th Cir. 1992); *Novak, supra* at 759, 761; *Hoefel v. Atlas Tack Corp.*, 561 F.2d 1, 7 (1st Cir. 1978), *cert. denied,* 440 U.S. 913, 99 S. Ct.

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3. Petitioner's explanation of *Novak, supra* is inaccurate. As noted by the *Fraser* court, *Novak's* only potential remedy was under ERISA Section 502(a)(3), because he had received all he was due under the plan. Petitioner also received all she was due under the plan. She was entitled to $173,545. That is what she received. The basis for the *Novak* court's distinction of *Warren* — that plaintiff was denied an actual benefit *(i.e.,* the contractual right to select from various options when withdrawing funds from the plan) — is equally applicable here, where there was no contractual agreement to provide notice of the rollover option. Thus, this case is more akin to *Novak.*

1227, 59 L. Ed. 2d 462 (1979); and *Kendal Corp. v. Inter-County Hospitalization Plan*, 771 F. Supp. 681, 685 (E.D. Pa. 1991). Petitioner's reliance on these cases is misplaced.

Hoefel is a pre-ERISA case where the court was not required to apply the particularized enforcement scheme of ERISA Section 502(a). The case has no application or precedential value to this case.

It is puzzling why Petitioner would rely on *Corcoran, supra,* a case which does not stand for the proposition advocated by Petitioner but, rather, supports the *Fraser* court's analysis. *Corcoran,* which pre-dated *Mertens,* wrestled with the availability of money damages as a form of "other appropriate equitable relief" under ERISA Section 502(a)(3). *Corcoran, supra* at 1334. The *Corcoran* court cogently summarized the difference between the claim for benefits remedy under ERISA Section 502(a)(1)(B) and extracontractual damages:

> Section 502(a)(3) provides for relief apart from an award of benefits due under the terms of a plan. When a beneficiary simply wants what was supposed to have been distributed under the plan, the appropriate remedy is § 502(a)(1)(B). Damages that would give a beneficiary more than he or she is entitled to receive under the strict terms of the plan are typically termed "extracontractual."

Id. at 1335.

Applied to this case, where Petitioner conceded that she received "what was supposed to have been distributed under the plan" and seeks " [d]amages that would give a beneficiary more than he or she is entitled to receive under the strict terms of the

plan," *id.*, the claim is for extracontractual damages and must be pursued, if at all, under ERISA Section 502(a)(3). This is exactly what the *Fraser* court concluded.

Following this summary, the *Corcoran* court noted that plaintiffs could not recover under ERISA Section 502(a)(3) because the relief sought — "money for emotional injuries —was not available as other equitable relief." *Id.* The *Corcoran* court proceeded to analyze the relationship between the law of trusts and contract law, including the concept of make whole damages. It cited *Warren* for the proposition that where a contractually defined benefit exists, ERISA Section 502(a)(3) permits a plaintiff to be made whole, including the award of reasonably proximate consequential damages. *Id.* at 1336-37.

This holding has been overruled by *Mertens,* which conclusively held that extracontractual money damages are unavailable under ERISA Sections 502(a)(3). Moreover, after stating this principle, *Corcoran* held that it was inapplicable because there was no "express agreement" creating a "contractually defined benefit." This is the same conclusion reached by the *Fraser* court, which found that the plan documents did not contractually bind Respondents to provide notice of the rollover option. *Fraser, supra* at 724 n.4, 726 n.7.

This is also the same conclusion reached in *Novak, supra,* which distinguished *Warren* on the ground that it involved a situation where the plan participant was denied an actual benefit he was entitled to under the plan." *Novak,, supra* at 761.[4] In

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4. It is disingenuous at best, and perhaps directly misleading, for Petitioner to cite *Novak,* as a federal court which "agreed with the *Warren* court's reasoning." Petition for Writ of Certiorari at pp. 10-11, n.10. The *Novak* court specifically rejected the *Warren* court's reasoning:

(Cont'd)

neither *Novak* nor this case was there an express contractual obligation that was disregarded.

The last case relied upon by Petitioner for the proposition that the *Warren* court's reasoning was adopted by " [o]ther federal courts" is *Kendal, supra.* Again, this case is inapposite and does not stand for the proposition asserted by Petitioner. *Kendal* dealt with a claim by a plan administrator and plan beneficiaries against a medical plan insurance provider for reimbursement of a $50,000 down payment required for certain non-conventional breast cancer treatment received by a plan participant. The plan administrator advanced the down payment. The provider denied responsibility for the down payment, contending that it was excluded from coverage as "experimental."

Initially, the *Kendal* court held that it did not need to determine whether ERISA Section 502(a)(3) authorized recovey. *Id.* at 684. Rather, the claim was analyzed under ERISA Section

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(Cont'd)

> *Novak* points to a Sixth Circuit case, *Warren v. Society National Bank,* 905 F.2d 975 (1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2256, 114 L. Ed. 2d 709 (1991), to support his claim that his damages are contractual and, hence, recoverable. *Warren* held that certain damages claimed by a beneficiary of an ERISA plan were "contractual" — as opposed to extra-contractual like those in *Russell* — and were recoverable under § 502(a)(3)(B) as "other appropriate equitable relief." Novak argues that his situation is factually similar to the plaintiff's situation in Warren and urges us to adopt its reasoning.
>
> First, we decline to adopt the reasoning of the Sixth Circuit on this issue.

Novak supra at 760-61 (emphasis).

502(a)(1)(B), the other ERISA provision relied upon. *Id.* at 683. *Kendal* held that the provider would be obligated to repay the $50,000 down payment as part of the participants' claim for benefits under ERISA Section 502(a)(1)(B) if the payment were determined not to be experimental treatment excluded by the policy. The court's rationale was that under ERISA participants should not be denied the full value of their plan benefits, citing *Warren, supra* at 982.

The *Kendal* court held that the participants' full value of benefits was the amount that would have been paid on the claim had the claim not been erroneously denied." *Id. supra* at 685. Therein lies the key distinction between *Kendal* and this case.

In *Kendal,* none of the claim had been paid and the damages sought were the amount of benefits which plaintiffs alleged should have been paid. Here, Petitioner admits that all benefits due were paid. She does not seek "what was supposed to have been distributed under the plan, the appropriate remedy" under ERISA Section 502(a)(1)(B), but "[d]amages that would give [her] more than . . . she is entitled to under the strict terms of the plan." *Corcoran, supra* at 1335. Such extracontractual damages are not recoverable under ERISA Section 502(a)(1)(B). Thus, *Kendal* does not support petitioner's argument.

Petitioner's effort to create a conflict in decisions from other courts is a mirage, a mere illusion. The cases cited do not support the position advanced by Petitioner. Instead, each case in consistent with the *Fraser* decision and supports Respondents' position.

The Sixth Circuit recognized the statutory distinction between damages for a "benefit due under the plan" extracontractual damages which represent damages in excess of what would have been available under the strict terms of the plan.

The *Fraser* court refused to equate tax advantages of plan participation with a benefit due under the plan, concluding, instead, that benefits due under the plan are limited to the distribution to which a beneficiary is entitled. This holding is in accord with all other cases addressing the issue and is consistent with the plain meaning of the statute. There is thus no basis for granting the Petition for Writ of Certiorari.

III.

GENERAL CONTRACT PRINCIPLES DO NOT AFFECT THE DISPOSITION OF THIS MATTER.

Petitioner argues that *Fraser* limits her recovery from what would have been available before enactment of ERISA, asserting that general contract law principles would have entitled her to be made whole, including the award of consequential damages such as the tax losses she suffered. She contends this result violates this Court's holding in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989).

It is elementary, beyond need of citation, that there must be a contract underlying a breach of contract claim. The *Fraser* court analyzed the summary plan description and held that it made no promise to advise Petitioner of the rollover option. *Fraser* at 724 n.4, 726 n.7. It also rejected implication of a contractual requirement to provide notice from the tax code. There is no ERISA requirement to provide notice of the rollover option.

There is, therefore, simply no contract upon which Petitioner can base a contract claim. The *Fraser* opinion does not provide less than existed before ERISA. A contract has always been required to invoke the make whole and consequential damage remedies of contract law. Since Petitioner can identify no contract requiring notice of the rollover option, Petitioner's contract law analysis by Petitioner is wholly inapposite.

CONCLUSION

This Petition presents no difficult or unique interpretations of ERISA. The decision below is not in contravention of this Court's prior opinions nor does it create a conflict in the circuits. The Sixth Circuit interpreted ERISA consistent with its plain meaning when it held that notice of a rollover option is not a "benefit due under the plan" as required to proceed under ERISA Section 502(a)(1)(B), especially where Petitioner concedes receipt of the entire amount owed to her by the plan..

There is no significant issue of jurisprudence posed by this Petition and Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: October 10, 1995

APPENDIX A — SAVINGS PLAN BOOKLET

[page 1]

MONEY
FOR
YOUR
FUTURE

SAVINGS
PLAN

Appendix A

[page 2] THE INTERPUBLIC GROUP OF COMPANIES, INC.
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- investment income.

The Plan enables you to save in three ways. You can make *before-tax* contributions — and lower your taxable income — through the Deferred Savings Program. You can also save on an *after-tax* basis through the Regular Savings Program. *Or*, you can save up to 16% of your annual pay through a combination of both programs.

No matter what you decide, the Company will match the first 6% of your contributions to the Savings Plan.

This booklet is a "summary plan description," as defined by the Employee Retirement Income Act of 1974 (ERISA). The Plan was established as of January 1, 1978 and has been modified a

number of times since then. The booklet reflects the increase in the matching Company contribution formula effective January 1, 1988 — as well as changes which will become effective January 1, 1989, as required by current federal legislation.

If you have any questions about the Interpublic Savings Plan, please contact your local Human Resources Administrator or the Benefits Manager at Interpublic.

Sincerely,

s/ C. Kent Kroeber
C. Kent Kroeber
Senior Vice President
Human Resources

Appendix A

[page 3] **HIGHLIGHTS**

Through the Savings Plan, you:

- can save up to 16% of your annual pay
- have a choice of deferred (before-tax) savings, regular (after-tax) savings . . . or a combination of both
- receive matching Company contributions on the first 6% of your savings
- earn interest income on the entire value of your account
- are always fully vested in your own contributions
- earn vested rights to the Company's contributions over a four-year period.

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[page 7] **ELIGIBILITY AND ENROLLMENT**

You are eligible to participate in the Savings Plan on your date of hire with Interpublic or one of its subsidiaries that has adopted the Plan.

However, if you are a special status employee, you will have to complete one year of service before you can participate in the Plan.

A *special status* employee means that your job is seasonal, temporary or part time. If you are a special status employee, a *year of service* means a calendar year in which you complete 1,000 hours of service. An *hour of service* is an hour for which you are paid or are entitled to payment.

To join the Plan, you must fill out an Enrollment/Change Card — available from your local Human Resources Administrator. When completing the card, you:

- elect a contribution rate from 1% to 16% of your annual pay

- indicate the percentage of your contributions that is deferred savings and the percentage that is regular savings

  and

- name your beneficiary. *If you are married, you must name your spouse as your beneficiary unless you receive your spouse's written, notarized consent to name another beneficiary.*

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YOUR CONTRIBUTIONS

You can choose to save between 1% and 16% of your annual pay through the:

- Regular Savings Program
- Deferred Savings Program

. . . or any combination of both programs.

Your *annual pay* is the salary and overtime that you earn in a calendar year. Bonuses, commissions or any other forms of extra compensation are not included in the Plan's definition of annual pay.

[page 8] *Deferred savings* means that your savings are deducted from your gross salary *before* federal and, in most cases, state and local income taxes have been withheld. This lowers your taxable income and, as a result, you pay less in current income taxes.

Regular savings are deducted from your gross pay *after* income taxes have been withheld.

The following example illustrates the difference between saving through the two programs. Let's assume that you earn $25,000 a year, are married, and file a joint federal tax return. Here's what the difference would be if you save 6% of your pay:

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	Regular Savings	Deferred Savings
Annual pay	$25,000	$25,000
Deferred savings (6%)	—	–1,500
Taxable income	$25,000	$23,500
Estimated federal income tax*	–3,750	–3,525
Regular savings (6%)	–1,500	—
Spendable income	$19,750	$19,975
Increase in spendable income		$225

* Based on federal tax rates for 1988. For simplicity, the example assumes you are married, filing a joint return and that your annual pay equals your taxable income.

By saving the same amount — $1,500 — through the Deferred Savings Program than through the Regular Savings Program, you can increase your spendable income by $225. And you will have an even greater increase in your spendable income in most locations in which your annual pay would also be subject to state and local income taxes.

Changing Your Contributions

Once you have been a Plan participant for six months, you can increase or decrease your contribution rate and/or switch between the two savings programs twice a year. If you change your contribution rate, you have to wait six months from the date the change goes into effect before you can change the rate again. In general, an increase or decrease in rates goes into effect on the first of the month following receipt of the change by the Payroll department. To make a change, simply complete an Enrollment/ Change Card, which is available from your local Human Resources Administrator.

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[page 9] You can also suspend your contributions at any time, with your election becoming effective as of the first day of the month after your request is received by your local Human Resources Administrator. However, you will not be able to make any additional contributions for a period of six months.

COMPANY MATCHING CONTRIBUTIONS

The Company will match the first 6% of your contributions to the Deferred Savings Program and/or the Regular Savings Program based on your years of service, as follows:

Years of Service	Company matching contributions on the First 3% of your contributions	Second 3% of your contributions
0 - 5	50%	20%
5 - 10	75%	35%
10 and over	100%	50%

Years of service for matching purposes means your service with Interpublic or one of its affiliated agencies. Your years of service are measured from the day you were hired, *not* the day you began participating in the Plan.

The Company matching contribution *applies only to the first 6%* that you contribute to the Deferred Savings Program and/or the Regular Savings Program. Your contributions from 7% through 16% of pay do not receive a matching Company contribution.

CATCH-UP CONTRIBUTIONS

If you are a participant in the Plan, you may be eligible to make an

unmatched lump sum "catch-up" contribution with after-tax dollars during the months of March, June, September and December.

These contributions may not exceed the difference between the maximum cumulative amount that you *could have* contributed above 6% and the amount that you actually did contribute.

For example, if from January 1, 1982 you saved 6% of your total pay through the Deferred Saving Program and/or the Regular Savings Pro-[page 10] gram, you *could have* contributed up to an additional 10% of your annual pay under the provisions of the Plan. If you were a participant but didn't contribute the entire 10%, you can make a catch-up contribution as follows:

If your actual contribution was:	You can make a catch-up contribution of up to:
6% or less	10%
7%	9%
8%	8%
9%	7%
10%	6%
11%	5%
12%	4%
13%	3%
14%	2%
15%	1%
16%	0%

In addition to the percentage limitation described above, any catch-up contribution you make is also limited by the government to 25% of your earnings less any deferred, regular, Company and other catch-up contributions made during the calendar year.

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Your local Human Resources Administrator can inform you of the amount of a catch-up contribution you may make and can supply you with a form during one of the designated periods.

HOW YOUR SAVINGS GROW

Your deferred savings, regular savings, and the Company's matching contributions are invested in insurance contracts with the Aetna Life Insurance Company. This investment has been designed to provide you with a fixed rate of return and guarantee the safety of your principal. For 1988, the guaranteed rate of return is 10.5%. This is likely to change from year to year.

THE PLAN IN ACTION

A good way to see how the Plan helps you accumulate earnings is to look at an example:

[page 11] Let's assume that you earn $25,000 and have been employed by Interpublic for seven years. If you save 6% of your annual pay, here's what the Company would contribute to the Plan on your behalf.

	Your Savings:	Company Match:
First	3% x $25,000 = $ 750	$750 x 75% = $ 563
Second	3% x $25,000 = 750	$750 x 35% = 262
Your savings for the year	= $1,500	Company match for the year = $825

The total contribution to the Plan on your behalf for that year would be $2,325 *plus* interest.

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If the same contribution and earnings assumptions are made and you work for the Company for:

- three years — the total contribution for that year would be $2,025 plus interest
- twelve years — the total contribution for that year would be $2,625 plus interest.

KEEPING YOU INFORMED

Twice each year, you will receive a personal report showing the status of:

- your contributions through the Deferred Savings Program
- your contributions through the Regular Savings Program
- the Company's matching contributions
- your catch-up contributions
- any rollover contributions you may have made

. . . *plus* the interest earned on your accounts.

VESTING

Vesting means that you have a non-forfeitable right to contributions made to your Savings Plan account *plus* any interest earned on that money.

You are *always* 100% vested in the value of the contributions that

that *you* make to the Deferred Savings Program and the Regular Savings Program. This includes your money plus the interest earned on your contributions.

[page 12] Generally, you become vested in the Company's matching contributions *plus* any interest earned on those contributions based on your years of employment with Interpublic or one of its subsidiaries which has adopted the Plan, as follows:

Years of Service for Vesting Purposes	Vesting %
less than 1	20%
1 to 2	40%
2 to 3	60%
3 to 4	80%
more than 4	100%

Years of service for vesting purposes are measured from your date of hire and each anniversary of that date. You are given for a year of service for vesting purposes as soon as you complete an hour of service each year.

You will also become 100% vested in the Company's contributions if you:

- retire at age 65 or older
- become totally and permanently disabled

or

- die

. . . regardless of your length of service.

PLAN PAYMENTS

You are eligible to receive the entire value of your deferred, regular and vested Company contribution *plus* any interest earned on that money when you:

- retire
- become permanently or totally disabled

or

- terminate employment.

You may elect one of the following payment methods:

- *Lump sum payment* — of the entire vested portion of your account. (If the balance of your account is $3,500 or less, you may not select another payment method.)

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- *Installment annuity* — in which you may elect to receive *equal* monthly or annual payments over a 5, 10, or 15 year period. *Annual payments* begin one year after you leave the Company; *monthly payments* begin immediately. If you die, any remaining payments will be paid to your beneficiary.

- *Life annuity* — provides you with monthly payments for the rest of your life. Your local Personnel Administrator can provide you with the details of this option.

It takes approximately 4-6 weeks for processing after your payment election is sent to Aetna. Payment election forms are sent to Aetna at the end of the month in which you terminate.

If you have ten or more years of service for vesting purposes, you may postpone any of these payment methods until no later than the April 1 following the calendar year in which you reach age 70 1/2.

WITHDRAWALS WHILE EMPLOYED BY THE COMPANY

The Plan is designed to help you save for your financial needs during your retirement years. However, situations can arise that require you to withdraw funds before you retire. The following provisions govern withdrawals while you remain in active service with the Company:

- *Regular savings* — and the interest on that money — may be withdrawn at any time. However, you will not be permitted to make any further contributions to the Regular Savings Program for six months, *unless* the withdrawal is made because of one of the following "financial emergencies":

  — the purchase or renovation of a primary residence

  — your education, or the education of a member of your immediate family

— a death or illness in your immediate family

— your disability — other than total and permanent disability. (If total and permanent disability occurred, you would be eligible to receive the entire value of your account.)

- *Deferred savings* — and the interest on that money — may be withdrawn — *only* if funds are needed for a financial hardship. The Internal Revenue Service defines "financial hardship" to include:

— the purchase or renovation of a primary residence

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— unreimbursed medical expenses

or

— educational expenses for you or a member of your immediate family,

- *Company contributions* — and the interest on that money may be withdrawn in a *special withdrawal* if you are 100% vested in the value of the your deferred, regular and Company contribution accounts on the day you attain age 59 1/2. This special *one-time only* withdrawal must be made in writing within 60 days of the day that you become 59 1/2. If you make this election, you cannot make any further contributions for a three month period following the date of withdrawal.

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When considering an in-service withdrawal, keep in mind that:

- it takes approximately 4-6 weeks to process your withdrawal payment

- financial hardship and emergency withdrawals *do not* mean that you have to stop making contributions to the Plan

- withdrawal of deferred savings, matching Company contributions or *any* interest earnings before you reach age 59 1/2 are generally subject to regular income taxes, *plus an additional 10% tax* — even if you are making the withdrawal because of a financial hardship or emergency.

TAX CONSIDERATIONS

When deciding whether and how much to save under the Plan, you should be aware of several considerations. As mentioned, the Plan enjoys certain tax advantages because it is intended to be a long-term retirement savings program.

Plan payments are recognized as taxable income in the year received. The Internal Revenue Service also imposes an additional tax of 10% — above the ordinary income tax otherwise payable — on the value of most withdrawals or Plan payments received before age 59 1/2.

Exceptions to this 10% additional tax rule include payments as the result of:

- retirement at age 55 or later after at least 5 years of service

- permanent disability

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- death
- medical expenses in excess of 7 1/2% of your adjusted gross income

  or

- a payment to someone else under a Qualified Domestic Relations Order (QDRO).

The 10% additional tax also will not apply if you make a "rollover" contribution to another company's tax-qualified plan or an Individual Retirement Account (IRA) within 60 days of your Plan distribution, and then do not receive the value of that account until you reach age 59 1/2.

If you have been a plan participant during at least five prior calendar years and you receive your Plan payout in a lump sum after age 59 1/2*, you may qualify for "five-year forward averaging." This is a special one-time tax calculation which can substantially reduce your tax liability when you receive your payout.

Federal tax law changes from time to time. Before you decide how to receive your Plan payment or whether to make a

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* If you were age 50 or older before January 1, 1986, then you can take advantage of five-year forward averaging even if you are not age 59-1/2 when you receive your distribution, or you may choose 10-year forward averaging under 1986 tax rates.

withdrawal, you may want to consult with a tax advisor of your own choosing.

OTHER IMPORTANT INFORMATION

Deferred Savings and Your Other Benefits

Interpublic benefits based on regular salary — such as pension disability and life insurance — are *not affected* by your deferred savings.

Rollover Contributions

If you are eligible to receive a single-sum cash distribution from an IRS-qualified savings or retirement plan from a previous employer, you may be able to "rollover" that amount — *less your own after-tax contributions to the previous plan* — into the Company contribution account of the Interpublic Savings Plan.

[page 16] You will always be 100% vested in the rollover amount. However, you may not withdraw your rollover contribution while you are in active service with the Company even for reasons of financial hardship.

Your local Human Resources Administrator can tell you how to make a rollover contribution. However, before making a rollover contribution, you may want to consult a tax expert to make sure that you can — or should — do so.

Participating Companies

As of July 1, 1988, the following Interpublic companies participate in the Plan:

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Bogart, Delafield, Ferrier Inc.
Dailey & Associates
International Business Service, Inc.
The Interpublic Group of Companies, Inc.
Lintas: Campbell-Ewald Company
Lintas: CECO Communications, Inc.
Lintas: New York
Lintas (Puerto Rico), Inc.
Lintas: Vos Direct, Inc.
Lowe-Marschalk, Inc.
McCann Direct, Inc.
McCann-Erickson Corporation (S.A.), Puerto Rico
McCann-Erickson, Inc.
McCann-Erickson Marketing, Inc.
McCann Healthcare, Inc.
North Light, Ltd.
The Phillips-Ramsey Company

If you are employed by an Interpublic company not listed above, contact your local Human Resources Administrator for more information about the Savings Plan.

In addition, United States citizens and residents who are employed outside the United States by certain subsidiaries of the Company are eligible to participate in the Regular Savings Program if contributions under another funded plan of deferred compensation are not provided by their employer. The names of such subsidiaries are available upon request to your local Human Resources Administrator.

[page 17] **Reemployment**

If you are a participant in the Plan, leave the Company and are

then rehired, you may participate again on the day you are rehired. If you return to work:

- *within twelve months* — you won't lose any vesting credit, and your rights to the nonvested portion of the Company's contributions will be restored to you

- *within five years* — your vesting credit and your rights to the non-vested portion of the Company's contributions will be restored to you.

- *after five years* — you will lose your vesting credit and your rights to the non-vested portion of the Company's contributions if the period of termination is equal to or greater than your years of service before termination.

Transfers

If you transfer from an Interpublic company which does not participate in the Plan to one that does, you are eligible to participate in the Plan on your first day of service with the new company.

Official Plan Name

The official Plan name is The Interpublic Group of Companies, Inc. Savings Plan.

Type of Plan

The Interpublic Savings Plan is known as a "defined contribution" type of plan, as defined in the Employee Retirement Income Security Act of 1974 (ERISA).

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Plan Records

Plan records are kept on a calendar year basis — from January 1 to December 31.

Plan Administrator

The Plan is administered by:

The Interpublic Group of Companies, Inc.
1271 Avenue of the Americas
New York, NY 10020
(212) 399-8049

[page 18] **Plan Funding and Plan Trustee**

The Company's contributions are determined by your savings elections and your length of service and — along with your savings — are sent through Aetna to the Plan Trustee:

Connecticut National Bank
777 Main Street
Hartford, Connecticut 06115

Claim Denial and Appeal

If you apply for Plan benefits and your claim is denied, the Finance Committee will provide you with a *written explanation* of:

- the reason for denial
- specific references to pertinent Plan provisions

- a description of any additional material or information that is necessary to perfect the claim

- an explanation of the Plan's claim appeal procedure.

Within 60 days after receiving the denial, you, your beneficiary, or an authorized representative may submit a *written request for reconsideration* to your local Human Resources Administrator, along with any documents and records that support your appeal.

Your claim will then be reviewed by the Finance Committee who will respond within 60 days of receipt of your claim, or 120 days under special circumstances. The decision of the Committee is final, and will include the specific reasons for the decision, and pertinent Plan provisions on which the decision was based.

Legal Service

Process can be served on the Company by directing such legal service to the Plan Administrator. Process may also be served on the Plan's Trustee.

Plan Identification Number

The Plan is identified by the following numbers under Internal Revenue Service rules:

- Employer Identification Number (EIN): 13-1024020

- Plan number: 003

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[page 19] **Non-Assignability of Benefits**

Benefits payable under the Plan are for the sole use of Plan participants and their beneficiaries. No one has the right to transfer, withdraw or assign the benefits payable to any other individual(s).

However, benefits may be paid according to a valid Qualified Domestic Relations Order (QDRO), if properly served on the Plan. A QDRO is an order or a judgment from a state court directing the Plan Administrator to pay all or a portion of a participant's Plan benefits to a former spouse or dependent.

Benefit Limitations

The Internal Revenue Service requires that plans which permit employees to make tax-deferred contributions meet a rather complex test to assure a fair mix of contributions from participants at all earnings levels. To maintain the proper balance, it may be necessary to limit the deferred contributions made by higher-paid eligible employees by adjusting these contributions to a level that is considered appropriate by the IRS. If such an adjustment becomes necessary, those employees who are affected will be notified.

Federal law currently limits the amount of contributions you may make to the Deferred Savings Program to $7,313 each year. (The $7,313 is subject to annual adjustment by the Secretary of the Treasury.) However, you can still participate beyond that amount on a regular contribution basis.

The law also limits your "annual additions" to:

- 25% of your annual pay

  or

- $30,000

. . . whichever is less.

Annual additions include all of your deferred, regular and Company and catch-up contributions in a calendar year *plus* forfeitures, if any.

Government regulations also specify the maximum contributions that can be added to a participant's account during a year. Consistent with Section 415 of the Internal Revenue Code, these limitations will apply to certain highly paid employees. The Plan Administrator will notify you if you are affected.

Beginning January 1, 1989, the maximum amount of annual pay that can be used to calculate Savings Plan benefits will be $200,000.

[page 20] **Top-Heavy Rules**

A "top-heavy" plan means a Plan that provides more than 60% of its benefits for "key" employees. Both "top-heavy" and "key" employees are terms that are defined under the Internal Revenue Code. In the unlikely event that the Pension Plan becomes top-heavy, you will be informed and your benefits may be modified to provide more rapid vesting, special minimum benefits and limits on covered compensation.

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Plan Continuance

Although the Company expects and intends to continue the Plan indefinitely, the Company reserves the right to change or terminate it due to changes in federal or state laws governing savings plans, the requirements of the Internal Revenue Code or ERISA, or any other reason. A Plan change may transfer Plan assets and debts to another Plan, or split this Plan into two or more parts. If the Company does make a change or terminates the Plan, it may decide to set up a different Plan providing similar or identical benefits.

If the Plan is terminated (or there is a transfer of assets or debts or a Plan split-up), you will have a vested or nonforfeitable right to your account balance(s) at the date of the change. The amount of your benefit may be paid to you in one or more cash payments or an annuity contract which will pay you a monthly income. The exact form of payment may be set by law; if there is a choice, the Plan Administrator will decide the type and timing of the payment.

After all benefits have been paid and legal requirements have been met, the Plan will turn over any remaining Plan money to the Company.

Pension Benefit Guaranty Corporation (PBGC)

Benefits under the Plan are not insured by the Pension Benefit Guaranty Corporation because federal law does not provide for Plan termination insurance for defined contribution plans.

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No Guarantee of Employment

Participation in the Plan shall not be construed as guaranteeing your Interpublic service, nor shall any Plan provision or condition restrict Interpublic's right to terminate your employment.

[page 21] **Forfeiture of Benefits**

If your employment terminates before you become vested, neither you not your eligible spouse (nor any other beneficiary) will receive any payments from the Plan.

Plan Documents

This booklet describes only the highlights of the Interpublic Savings Plan, and does not attempt to cover all its details. These are contained in the official Plan text and Trust Agreement which legally govern the operation of the Plan and which are controlling in the event of a conflict between this booklet and the Plan. These documents, as well as the annual report of Plan operations and Plan description as filed with the Internal Revenue Service and the U.S. Department of Labor, are available for review in the Personnel Services Department during normal working hours. Upon written request to the Plan Administrator, copies of any of these documents will be furnished to any Plan participant or beneficiary within 30 days, at a nominal cost.

YOUR RIGHTS UNDER ERISA

(Employee Retirement Income Security Act of 1974)

The benefits provided by the Savings Plan are covered by ERISA.

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The law does not require a company to provide benefits, but it does set standards for any benefits that a company wishes to offer. And it requires that you be given an opportunity to learn what those benefits are and your rights to them under the law.

This booklet is one way that we work to help to keep you informed about your Savings Plan. Also, each year you receive — at no cost — a copy of the summary annual report of the Plan's financial activities. And, as mentioned earlier, you can review all supporting Plan documents or buy copies of them at a nominal cost. You also have a right to expect fiduciaries — the people who are responsible for the management of the Plan — to act prudently and in the best interests of participants in the Plan and their beneficiaries.

Another one of your rights relates to the claim appeal procedure described earlier — the right to receive written notice if your claim for benefits should, for any reason, be denied in whole or in part, plus the right to have your [page 22] claim reconsidered. And, of course, Interpublic will not dismiss you or otherwise discriminate against you in any way to prevent you from obtaining benefits from this Plan or exercising your rights.

Because your rights under ERISA are protected by law, you can also file suit if the need ever arises. For example, if the Plan Administrator should fail to furnish within 30 days any documents you have requested in writing, you can file suit in a federal court. And the court may require the Plan Administrator to pay you up to $100 for each day's delay until the materials are received, unless the documents were not sent because of matters beyond the control of the Plan Administrator.

You can also seek assistance from the U.S. Department of Labor

or file suit in a federal court if you believe a fiduciary has misused plan funds or if your rights under the law are interfered with. Legal action can also be taken in either a state or federal court if you believe you have been improperly denied a benefit.

The court will decide who pays court costs and legal fees. If you're successful, the other party may have to pay. But, if you lose — because, for example, your case is considered frivolous — you may have to pay all these costs and fees on your own.

If you have any questions about your Savings Plan, contact Human Resources or the Plan Administrator. If you have any questions about your rights under ERISA, you can contact the nearest Area Office of the Labor-Management Services Administration, U.S. Department of Labor.